IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1168-1170

HUDSON McGUIRE, *et al.*,

Petitioners,

v.

EQUITABLE OFFICE BUILDING CORPORATION (name changed to "EQUITABLE OFFICE BUILDING 1913 CO. INC."), Debtor,

ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of Debtor, and

CHARLES A. DANA, *et al.*, Committee of Common Stockholders of Debtor,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully pray that writs of certiorari issue to the Circuit Court of Appeals for the Second Circuit to review the judgments of that court (R. 436, 437) filed on December 31, 1946 and January 28, 1947, respectively, and the order of that court (R. 438) filed on January 28, 1947.

The judgment filed on December 31, 1946 reversed orders of the District Court for the Southern District of

New York, denying petitions of stockholders Knight and Doyle to "alter" and "amend" a plan of corporate reorganization and vacate the order of confirmation. The judgment filed on January 28, 1947 reversed orders in the same matter denying petitions of the Debtor and a Committee of Common Stockholders of the Debtor to dismiss the proceedings in reorganization, upon completion of proposed refinancing upon terms identical with the proposals of Knight and Doyle. The order entered January 28, 1947 was ancillary to the two judgments of the said Circuit Court of Appeals.

Petitioners are holders of debenture bonds of the debtor.

Opinions of the Courts Below

The District Judge filed a memorandum opinion on July 16, 1946 (R. 99) regarding the denial of the petitions. The memorandum opinion has not been reported.

The opinion of the Circuit Court of Appeals for the Second Circuit regarding the petitions of Knight and Doyle (R. 427-435) was filed December 31, 1946. The Opinion is reported at 158 F. 2nd 838. The *per curiam* opinion of that court regarding petitions of the Stockholders' Committee and the Debtor (R. 437) was filed January 28, 1947. The *per curiam* opinion is reported at 158 F. 2nd 982.

(The opinion of Mr. Justice Reed of this court, filed August 6, 1946 (R. 362-369) upon a matter preliminary to the determinations of the Circuit Court of Appeals for the Second Circuit has not been reported as yet.)

Jurisdiction

Jurisdiction to issue the writs requested is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347 (a)) and Section 24 (c) of the Bankruptcy Act (Title 11, U. S. C. A. Section 47 c).

Statutes Involved

The pertinent provisions of the Bankruptcy Act, as amended, are found in the appendix to this Petition.

Statement

On April 10, 1941, the Debtor filed its voluntary petition for reorganization under Chapter 10 of the Bankruptcy Act, in the District Court for the Southern District of New York. On that day, the petition was approved and trustees were appointed (R. 1).

After five years of proceedings, a plan of reorganization of the Debtor was accepted by the requisite vote of interested security holders and was regularly confirmed by the court (R. 244-8).

The plan provided for participation by stockholders of the Debtor for the reason that the court, over the objection of the Securities and Exchange Commission, found a nominal equity for shareholders (R. 181).

The order confirming the plan was entered on May 13, 1946 (R. 261). The time to appeal from the said order expired on June 22, 1946. No appeal was taken.

Consummation of the Plan was completed, except for the transfer of the properties and formal exchange of securities. By orders dated respectively June 7, 1946 and June 24, 1946 (R. 3), the District Court approved the proposed officers and directors of a new corporation to be formed under the Plan, an indenture trustee for new income bonds to be issued to the debenture holders, the proposed certificate of incorporation, by-laws, stock certificates, scrip certificates, and the statement and designation required to qualify in New York State the new corporation to be used under the Plan to take over the assets of the Debtor. The orders "authorized and directed" that such documents be executed and filed. On July 8, 1946, the District Court made and entered its order of consummation (R. 273) which,

among other things, "authorized, ordered and directed" the execution and delivery of various instruments necessary to the consummation of the Plan.

The consummation of the Trustee's Plan accomplished the following: The old corporation was deprived of its power to do business under its corporate name; the new corporation provided for by the Plan was duly organized and qualified to do business in the State of New York; the officers and directors approved by the court were elected; the securities were printed; the new trust indenture as approved by the court was printed and qualified with the Securities and Exchange Commission; the new stock was approved for listing by the New York Stock Exchange, subject to transfer of the properties, a transfer agent and a registrar for the new stock was appointed and approved by the court; the instruments of conveyance by the Trustees of the new corporation were executed and arrangements were completed for the opening of bank accounts for the new corporation.

The stockholders were ably represented, the Stockholders' Committee, acting through its counsel, taking an active part in all the proceedings. The Committee joined with the debenture holders and other parties in requesting the parties to approve and confirm the Trustee's Plan.

On July 11, 1946, twenty days after the time to appeal from the order of confirmation had expired and when final consummation of the Plan by delivery of the instruments of conveyance was awaiting only formal clearance of the trust indenture by the Securities and Exchange Commission, the first of the several *ex-parte* petitions was filed by Knight and Doyle, stockholders (claiming to own 2,200 shares) seeking to file so-called "amendments". Neither Knight nor Doyle is a stockholder of record (R. 63).

In their original petition (R. 4) petitioners Knight and Doyle sought an order to show cause (R. 15) why the confirmed plan of reorganization should not be "modified"

and "amended", and the consummation of the confirmed Plan stayed pending consideration and approval of their proposed amendments. By a second or supplemental petition (R. 38) and a third petition (R. 147) petitioners Knight and Doyle sought precisely the same relief as in the first petition, except that in the third petition they also prayed for a vacation of the order of confirmation and the order of consummation.

The so-called amendments to the confirmed Plan proposed in these three petitions constituted in reality a new Plan. Under the terms thereof it was proposed that $5,172,588 should be raised by giving to the stockholders for each share of old stock, a right to subscribe at $6.00 per share for one share of stock of the new corporation to be organized under the Plan. With the money thus raised, supplemented by cash to be taken from the Treasury of the Debtor, it was proposed that the debentures be paid in full with accrued interest. The petitions were supported by a purported commitment by City Investing Company to underwrite the purchase of the stock by the stockholders for an underwriting fee of 69,686 shares of the stock of the new corporation (R. 154-159).

The so-called commitment, which was dated July 19, 1946 (R. 154-159), expired October 16, 1946. The conditions of the so-called commitment were such that it could not be completed within the time specified. Under the agreement the Underwriter was not required to purchase any of the shares unless, prior to October 15, 1946, the proposed new plan should have been finally confirmed by the court, the new plan should have been consummated, any rights to appeal from orders confirming or relating to the consummation of the plan should have expired, any appeals which might have been taken should have been finally disposed of, the new stock should have been offered to the old stockholders and not subscribed for, delivery to the Underwriter of unsubscribed shares upon payment by it of $6 for each of such unsubscribed shares should be effected, delivery to the

Underwriter of 69,686 shares of new stock as a fee for underwriting should have been delivered. All must have been accomplished within the 80 odd days prior to October 15, 1946.

The petitions contained no allegations of fraud, irregularity or surprise or change in the economic condition of the Debtor since the Plan or reorganization was confirmed on May 13, 1946. No allegations were made that the Debtor's property was worth more than the value found by the court in its orders of approval and confirmation.

The original and supplemental petitions were denied by endorsement thereon by the District Judge on July 16, 1946 (R. 99). The third petition was denied by the District Judge by endorsement thereon dated July 31, 1946 (R. 146).

The proposals on behalf of the Committee of Common Stockholders and the Debtor were identical with the proposal of Knight and Doyle except that those petitioners sought a dismissal of the proceedings after the completion of the proposed financing. The petitions incorporating such proposals were denied by the District Judge on July 16, 1946 (R. 99) and July 31, 1946 (R. 142), respectively.

Among the considerations upon which the District Judge in the exercise of discretion based his determination that the several proposals should be rejected, were the following:

(1) The order of confirmation of the Trustee's Plan was entered May 13, 1946 and the time to appeal therefrom had expired on June 22, 1946, some weeks prior to the filing of the petitions.

(2) The confirmed plan was "fair and equitable."

(3) The consummation of the Trustee's Plan was completed in substance.

(4) The so-called commitment of the Underwriter was entirely illusory, being inadequate with respect to time and the amount thereof and otherwise.

(5) All of the parties who had appeared in the proceedings had consented to the confirmed plan and had acquiesced in its approval and confirmation.

(6) The stockholders and bondholders qualified to vote on the plan had accepted the plan by votes in favor thereof of 85% and 99%, respectively.

(7) The new plan was of doubtful benefit to stockholders.

(8) The "fee" of the Underwriter of 69,686 shares was unconscionable.

(9) Numerous persons had engaged in transactions in the securities of the old Company and in the shares of stock of the new Company on a "when issued" basis in reliance upon the integrity of the court order—the order of confirmation and the fact that the time to appeal from the order of confirmation had expired.

(10) No fraud, mistake, gross inequity or similar ground for vacating the previous orders of approval and confirmation was alleged or proved.

(11) The new plan would result in delay and increase the expense to which the Debtor would be subjected.

The Circuit Court of Appeals for the Second Circuit reversed the orders entered denying the petitions of Knight and Doyle (R. 436) and thereafter on the authority of such determination reversed the orders entered upon the petitions of the Debtor and the Committee of Common Stockholders (R. 437).

In reversing the orders, the Circuit Court of Appeals held that the District Judge abused his discretion in rejecting the proposals made on behalf of the petitioners and held that it was *mandatory* for the District Judge to submit the proposals to shareholders. In finding that the District Judge had abused his discretion, the court ruled on matters involving the construction of several sections of the Bankruptcy Act (R. 427-435). The court directed the method by which the judgments of reversal should be carried out in

its order ancillary to the two judgments (R. 438). The court held that the matters were not moot although the commitment had expired under its terms prior to submission in and determination of the matter by the court. The court failed to consider the contention that the petitions in substance were motions for a rehearing, orders denying which are not appealable.

II. Questions Presented

The questions presented are:

1. Did the Circuit Court of Appeals err in holding that the District Judge abused his discretion in refusing to approve, after the time to appeal from the order confirming the plan had expired, and after the plan had been substantially consummated, and upon the terms proposed including those in the illusory commitment, so-called modifications and amendments of a plan of reorganization which had been confirmed with the consent and acquiescence of all classes of creditors and stockholders and in refusing to vacate the order confirming the plan?

2. Did not the order of confirmation entered under Sec. 224 of the Act and the expiration of the time to appeal from such order vest in Petitioners who relied upon the order the right to receive the securities allocated to debenture holders under the plan?

3. What are the limitations upon the right to file modifications or alterations to a plan of reorganization under Section 222 of the Act (and are radical changes such as were proposed by respondents, permissible "modifications" or "alterations"?)

4. Did not the Circuit Court of Appeals err in holding that the questions presented were not moot?

5. Is not a petition to set aside an order of confirmation, such as respondents made herein, in effect a motion for a rehearing, the denial of which is not appealable?

III. Reasons Relied on For Allowance of The Writs

1. The decisions of the Circuit Court of Appeals present important questions in reorganization proceedings under Chapter 10 of the Bankruptcy Act which have not been, but should be, settled by this court.

2. The decisions of the Circuit Court of Appeals appear to be in conflict with decisions of other circuits and with former decisions of the Second Circuit.

3. The decisions of the Circuit Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Among other things, under the decisions, amendments to a confirmed plan are permitted up to the time the trustee is discharged making it impossible to trade in securities of a company in reorganization with any degree of safety prior to the time the trustee is discharged.

As to 1.—"Important Questions"

(a) Discretionary Action.

At the outset, the question of the finality to be attributed to a court order is presented. It is important that the limitations upon the right of a Circuit Court of Appeals to set aside discretionary orders of the District Judge in reorganization proceedings be reviewed and settled by this court —particularly in cases such as this where the time to appeal from the order of confirmation had expired and those challenging the discretionary action have been parties to and represented in the proceedings. The business world has become accustomed to placing reliance upon orders confirming plans of reorganization. Such a decision as that of the Court of Appeals in this matter, of course, will "chill" such reliance.

In reviewing the discretionary aspect of the action of the District Judge the Circuit Court of Appeals limited its consideration to three matters: (1) A conflict of interest

between the debenture holders and the shareholders, (2) the fact that after years of delay reorganization had finally culminated in a confirmed plan, and (3) doubts that a new company would have sufficient liquid assets. The determinations with respect to the effect of these several considerations involve questions in reorganization proceedings under the Act which have not been settled and which are outlined below. The uncertainty with respect to the matters considered requires settlement. In passing it may be noted that the Circuit Court of Appeals held that the adequacy of working capital was not a question even for the consideration of the District Judge (R. 435). More important, however, is the fact that the court failed to consider many of the circumstances upon which the District Judge undoubtedly relied. These circumstances in part are set forth on pages 6 and 7 of this petition. Among the more important matters which the court appears not to consider of importance in reviewing the propriety of the discretionary action of the District Judge are the following circumstances: (1) The entire inadequacies of the so-called commitment which was illusory when made and which expired under its terms even prior to the time the matter was submitted in the Circuit Court of Appeals, and (2) that all the parties who had appeared in the proceeding had consented to the confirmed plan and had acquiesced in its approval and confirmation.

Furthermore, it is apparent from the opinion that considerations as to enhanced value of the Debtor's property had considerable weight in the decision of the court. The fact is that the several petitions contained no allegations of enhanced value. The Circuit Court of Appeals appears to presume such enhancement as the result of the fact that the illusory commitment was made and the circumstance that in a narrow "over the counter" market, the price of the securities of the Debtor appeared to reflect an enhanced equity.

To summarize: questions are raised with respect to the proper construction and application of provisions of the Act to those facts considered, the propriety of the failure

of the Circuit Court of Appeals to consider circumstances which undoubtedly influenced the District Judge and the propriety of the court's action in presuming enhanced value.

This court has indicated that special weight should be given to findings of the District Judge in reorganization proceedings in view of his familiarity with the proceedings (*R. F. C.* v. *Denver & Rio G. W. R. Co.*, 90 Law Ed. 1134 (1946) in which this court reversed the decision of the Circuit Court of Appeals for the Tenth Circuit (reversing an order of confirmation of the District Court) and affirmed the District Court's order of confirmation; *Ins. Group* v. *Denver & Rio G. W. R. Co.*, No. 690, October Term, 1946, decided February 3, 1947—C. C. H., U. S. Supreme Court Bulletin, October Term 1946, page 677, in which this court affirmed the order of the District Court dismissing a petition of the debtor seeking to set aside an order confirming a plan of reorganization. *Cf., Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448.

(b) Effect of Section 224 regarding vesting of rights.

Section 224 of the Act provides in substance that "the plan and its provisions shall be *binding* upon the debtor—and upon all creditors and stockholders", and contains other provisions which would appear to make the confirmed plan definitive.

The indication in the available authorities is that the order of confirmation definitely fixes all the rights of all the parties.

For example, in *In re Diversey Bldg. Corp.*, 141 F. (2d) 68, C. C. A. 7, the Court, with respect to an order of confirmation, says "that decree, however, was interlocutory in its character, and definitely fixed all the rights of all the parties, and it was a final and appealable decree".

Other authorities are in accord. However, the Circuit Court of Appeals in the matter before the court held that the order of confirmation was "not conclusive" and that debenture holders were not "adversely affected" by the proposals of the respondents. In substance, the court held

that "modifications" or "alterations"—radical in their effect upon rights as determined by the plan—might be proposed at any time prior to the "final decree" under section 228, providing that "Upon ~~confirmation~~ CONFIRMATION—the judge shall enter a final decree (1)—terminating all rights and interests of stockholders * * *."

(c) Effect of Section 222 authorizing amendments.

Section 222 of the Act provides that "a plan may be altered or modified, with the approval of the judge, * * * before or after its confirmation * * *". The question arises as to the meaning of Section 222 when read with Section 224 and other provisions of the Act (such as Sections 226 and 228).

The indication in the authorities is that the modifications or alterations authorized under Section 224 are such changes "as will better aid in carrying out the plan which has been finally confirmed, and not such changes as will materially alter the property rights established by the decree of confirmation". In *In re Diversey Bldg. Corp.*, supra; *Country Life Apts.* v. *Buckley*, 145 F. (2d) 935, C. C. A. 2.

With respect to the power to amend given the court by Section 77B(f)—the antecedent of Section 222—the report of the Senate and House Judiciary Committees at the time the bill was under consideration by Congress reads in part: "Experience suggests the advisability of such a provision, as amendments are sometimes requisite, not only to obtain the required number of consents, but also after the required number of consents have been obtained, to provide for matters not foreseen, to correct errors, mistakes, omissions, etc." (S. Rep. No. 482, 73rd Cong., 2nd Sec. (1934) 9; H. Rep. No. 194, 73rd Cong., 1st Sec. (1933) 9.)

The proposals of the respondent were such that modifications or alterations incorporating the same could not be deemed the correction of "errors, mistakes and omissions". The Circuit Court of Appeals so held but deemed the proposals such as involved "matters unforeseen". In this regard, the court states that the rise in value of the debtor's

property (which the court presumed) could not have been foreseen at the time the plan was approved. This determination involves the questions as to whether modifications and amendments may be with respect to "matters not foreseen" and if so, whether a (presumed) increase in value is such as to constitute the basis of a modification or alteration. An application of the *sui generis* rule would indicate that the "matters not foreseen" should be limited to incidental changes such as "errors, mistakes and omissions". Likewise, in light of the fact that the Congressional Report comments on amendments "after the required number of consents have been obtained", the Congressional intent plainly is to permit only such amendments as would not require the securing of new consents.

(d) Effect of Expiration of Time to Appeal and Lapse of Time.

Uncertainty as to the effect of lapse of time upon the right to propose modifications or alterations to a plan exists. Petitions to alter or modify have been denied (1) after confirmation and expiration of the time to appeal (In *In re Diversey Bldg. Corp.*, supra); (2) at the time of confirmation (*Country Life Apts.* v. *Buckley*, supra); (3) after approval and before confirmation (*Rogers, et al.* v. *Consolidated Rock Products Co.*, 114 F. (2d) 108 C. C. A. 9).

Under the decisions of the Circuit Court of Appeals herein, modifications and alterations would be permissible at any time prior to the date of the entry of the "final decree" under Section 228 (R. 43). Complete consummation antedates this final decree. Properties have been transferred and securities issued. Certainly modifications and alterations should not be permitted after consummation in fact has been effected.

Many of the existing uncertainties adverted to above are referred to by Mr. Justice Reed in his opinion (R. 362-369). The desirability for clarification and settlement of these questions is apparent.

As to 2.—"Conflicts"

(a) With Respect to Nature of Amendments.

The decisions of the Circuit Court of Appeals appear to be in conflict with decisions of the Circuit Courts of Appeals of the First, Second, Seventh, and Ninth Circuits, to the effect that amendments and modifications permissible under Section 222 (and under former Section 77B(f)) are limited to "such changes as will better aid in carrying out the plan which has been finally confirmed".

In *In re Diversey Bldg. Corp.*, 141 F. (2d) 68, C. C. A. 7, the court with respect to Section 77B(f) said:

> "We cannot accept appellant's interpretation of subsection (f) of this Act. We are convinced that Congress did not intend that a debtor corporation should be permitted to ask for a radical change of a plan of reorganization after it had been confirmed by the court and was being executed under the court's supervision • • •
>
> "We interpret subsection (f) to mean that changes and modifications after the plan is confirmed refer to *such changes as will better aid in carrying out the plan* which has been finally confirmed, and *not such changes or modifications as will materially alter the property rights established by the decree of confirmation,* and in no event shall any change be made without the consent of the court." (Italics ours.)

The following cases are substantially to the same effect:

Country Life Apts. v. *Buckley,* 145 F. (2d) 935, C. C. A. 2;

Rogers v. *Consolidated Rock Products Co.,* 114 F. (2d) 108, C. C. A. 9;

Downtown Inv. Ass'n v. *Boston Metropolitan Bldgs.,* 81 F. (2d) 314, C. C. A. 1.

(b) With Respect to Time of Amendment.

The decisions appear to be in conflict with decisions of the Seventh Circuit in so far as they hold that the proposals such as those of respondent may be offered subsequent to the order of confirmation and the expiration of the time to appeal. *In re Diversey Bldg. Corp.*, supra, cf., *R. F. C.* v. *Denver & Rio G. W. R. Co.*, 90 L. Ed. 1134.

As to 3.—Departure from usual course of judicial proceedings.

(a) Moot Questions.

The so-called commitment of the City investing Company expired on October 16, 1946 (R. 155), prior to the time of the argument in and decisions of the Circuit Court of Appeals.

Under such circumstances where the element of controversy disappears from a case, whether by act of the parties or change of circumstances, the matter becomes moot. The authorities uniformly hold that a Federal Court is without power to decide moot questions or give advisory opinions which cannot affect the rights of the litigants in the case before the court. *U. S.* v. *Alaska Steamship Co.*, 253 U. S. 113; *St. Pierre* v. *U. S.*, 319 U. S. 41.

In the *Alaska Steamship Co.* case, supra, this court at page 116 stated:

> "Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot, and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' "

(b) Motion for rehearing—not appealable.

The Circuit Court of Appeals disregarded the contention of petitioners that the petition, in so far as it sought the vacation of the order of confirmation, was, in effect, a motion for a rehearing and that the order of denial was not appealable.

It is well established by the decisions of this court that neither a refusal to entertain such a motion nor a denial of such a motion, if entertained, is appealable. *Wayne Gas Co.* v. *Owens-Ill. Glass Co.*, 300 U. S. 131, 137; cf. *Ins. Group* v. *D. & R. G. W. RR. Co.* No. 690, October Term 1946, decided February 3, 1947.

(c) Principles applicable to judicial sale.

The desirability of attributing finality to a judicial sale is well established. Except upon the extremest provocation, courts will not upset a judicial sale. The beneficial result of the rule is that a prospective bidder may not refrain from bidding, bide his time and then outbid the price at which the property has been struck down. A contrary rule would chill bidding and defeat the very purpose of the auction. The Circuit Court of Appeals recognized the rule and its beneficial principles, but held the principles inapplicable to a plan of reorganization and an order of confirmation (R. 433-4).

A realistic view would appear to disclose the analogy between the sale and the order of confirmation strikingly apparent. The order should be set aside only upon the "extremest provocation".

If the analogy had been settled last July, the long delay of months and probably a year at least would have been avoided in the instant matter. If the analogy is not settled, interminable delay may result in this matter. Others such as Knight and Doyle may be biding their time waiting to offer some new proposal or proposals. In this regard, this matter is characteristic of many reorganization proceedings.

Conclusion

It is important in the administration of the Bankruptcy Act that the novel implications of the decisions of the Circuit Court of Appeals be set at rest and that trustworthy standards be settled regarding the matters presented. The questions are of public concern in the entire field of corporate reorganizations, as well as to the many persons in the matter presently before the Court. Settlement of the questions involved will lessen the number of controversies presented in proceedings under Chapter 10 of the Act and avoid prolonged delay in the settlement of such controversies.

WHEREFORE, your petitioners respectfully pray that writs of certiorari issue out of and under the seal of this court, directed to the Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court a full and complete transcript of the record of the proceedings of said Circuit Court of Appeals to the end that these causes may be reviewed and determined by this court as provided for by the statutes of the United States, and that the said judgments and order of said court may be reversed by this court, and for such other and further relief as to this court may seem proper.

Dated, March 27, 1947.

HUDSON MCGUIRE; Duncan Sterling et al., doing business under the partnership name and style of Sterling Grace & Co.; Duncan Sterling et al., as trustees for Ellen Furey; Jacques Pascal; and Howard M. Erskine,
Petitioners

By

George T. Barker
Counsel for Petitioners

APPENDIX

Sections of Chapter X of the Bankruptcy Act

Article XI—Confirmation and Consummation of Plan

Sec. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such officers, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

Sec. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or

modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

SEC. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

SEC. 224. Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

SEC. 225. Where the claims or stock specified in paragraph (4), clause (b), of section 224 of this Act are objected to by any party in interest, the objection shall be heard and summarily determined by the Court.

SEC. 226. The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

SEC. 227. The court may direct the debtor, its trustee any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

SEC. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

• • • •

SEC. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

(1) where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

Federal Rules of Civil Procedure

Rule 60. Relief from Judgment or Order.

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C. A. Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Nos. 1172 - 1174

Supreme Court of the United States

OCTOBER TERM—1946

HARRY R. AMOTT, JESSE L. SHEPHERD, FRANCIS E. SMITH and HUBERT F. YOUNG, constituting the Debenture Holders' Protective Committee for Equitable Office Building Corporation, and

J. DONALD DUNCAN, Trustee of Equitable Office Building Corporation, Debtor in Reorganization Proceedings under Chapter X of the Bankruptcy Act,

Petitioners,

against

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation,

EQUITABLE OFFICE BUILDING CORPORATION (name changed to "Equitable Office Building 1913 Co., Inc."), Debtor, and

ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of Equitable Office Building Corporation,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

AND SUPPORTING BRIEF

March 27, 1947

FRANK R. BRUCE,
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New York City.

HENRY S. HOOKER,
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50 Broadway,
New York City.

The undersigned have joined in the within petition for writs of certiorari:

T. FERGUS REDMOND,
Attorney for Empire Trust Company,
Indenture Trustee for the Debenture Holders,
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W. RANDOLPH MONTGOMERY,
Attorney for Wertheim & Co., *et al.*, Debenture Holders,
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Supreme Court of the United States

OCTOBER TERM—1946

HARRY R. AMOTT, JESSE L. SHEPHERD, FRANCIS E. SMITH and HUBERT F. YOUNG, constituting the Debenture Holders' Protective Committee for Equitable Office Building Corporation, and

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Harry R. Amott, Jesse L. Shepherd, Francis E. Smith and Hubert F. Young, constituting the Debenture Holders' Protective Committee for Equitable Office Building Corporation, and J. Donald Duncan, as Trustee of Equitable Office Building Corporation, Debtor in reorganization proceedings under Chapter X of the Bankruptcy Act, respectfully pray that writs of certiorari issue under Section 24(c) of the Bankruptcy Act (11 U. S. C. A. § 47(c)) and Section 240(a) of the Judicial Code (28 U. S. C. A. § 347(a)) to review the judgments of the

United States Circuit Court of Appeals for the Second Circuit dated December 31, 1946 and January 28, 1947, respectively, and an ancillary order of that Court dated January 28, 1947 (R. 438).

A certified copy of the pertinent portions of the records in the instant proceedings, including the proceedings in said Circuit Court of Appeals, has been furnished in accordance with Rule 38, Par. 1 of the Rules of this Court.

Opinions

Opinions have been rendered in these proceedings by the District Court and by the Circuit Court of Appeals for the Second Circuit and have been included at pages 99, 427 and 437, respectively, in the record of the proceedings furnished to this Court. The main opinion of the Circuit Court under the title of *Knight et al.* v. *Wertheim & Co. et al.*, is reported in 158 F. 2d 838. The *per curiam* opinion of the Circuit Court under the title of *Charles A. Dana et al.* v. *Wertheim & Co. et al.*, is reported in 158 F. 2d 982.

Mr. Justice Reed of this Court rendered an opinion (R. 362) in connection with his order dated August 6, 1946 (R. 360) granting to the above-named respondents in cases 609, 610 and 612 (October Term 1946) a stay of consummation of the confirmed plan of reorganization "until this Court determines whether a writ of certiorari shall be granted herein, and, if such writ be granted, pending the further order or the final disposition of this cause by this Court".

This Court on November 25, 1946 rendered a partial decision on the petitions of the respondents for writs of certiorari in cases 609 and 610 as follows:

> "So much of the respective petitions for certiorari in these cases as asks for a writ to review the order of the United States District Court for the Southern District of New York is denied."

However, there remain undetermined in this Court the remainder of the petitions of the respondents in cases 609 and 610, and the whole of the petition of the respondents in case 612 for writs of certiorari to review the orders of the Circuit Court of Appeals for the Second Circuit, which, on July 18 and 31, 1946 denied to the respondents a stay of the consummation of the confirmed plan of reorganization.

The stay of consummation of the confirmed plan of reorganization, granted by Mr. Justice Reed on August 6, 1946, is still outstanding and effective pending action of this Court upon the petitions (609, 610 and 612) of the three sets of respondents above named.

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(c) of the Bankruptcy Act (11 U. S. C. A. § 47(c)), and under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. § 347 (a)).

Statutes Involved

The pertinent provisions of the Bankruptcy Act, as amended, are found in the appendix to this petition.

Statement

The debtor corporation is the owner of a large office building in lower Manhattan, known as the Equitable Building (R. 427). On April 10, 1941 the debtor filed a petition for reorganization under Chapter X of the Bankruptcy Act, and the District Court approved the petition on the day it was filed (R. 1).

On February 24, 1944, the Trustee filed a proposed plan of reorganization. The Trustee filed amendments to his plan on February 5, 1945. The Trustee on March 9, 1945 filed an amended plan of reorganization, and on May 11, 1945 he filed another amendment of the plan. On June 29, 1945 the Trustee filed amendments to his plan. On October 5, 1945 the common stockholders' and debenture holders' committees jointly filed amendments to said plan. On November 16, 1945 the Trustee filed further amendments to the plan (R. 175-176).

Prior to the approval of the plan by the District Court, extensive hearings were conducted on the valuation of the property. Fifteen hearings were held before the Court with 854 pages of testimony and 48 exhibits.

The independent real estate appraiser employed by the Trustee, pursuant to Court order, to appraise the property in the reorganization proceedings placed a value on the land and building of $20,000,000 (R. 287). The appraiser employed by the common stockholders' committee stated the value should be $23,500,000 (R. 292). On November 16, 1945 the Securities and Exchange Commission stated in Court through its representatives that the $20,000,000 valuation by the independent appraiser was an "optimistic high" (R. 322).

The representative of the Securities and Exchange Commission reported to the Court that the Commission considered the reorganization plan unfair because it allows the common stockholders to participate in the plan, in view of the fact that in the Commission's opinion the value of the property does not exceed the debts of the Corporation and, consequently, there is no equity for the stockholders (R. 233).

The District Court determined that the value of the land and building was $21,375,000, or $1,375,000 in excess of the maximum value urged by the Commission; and that the value of the debtor's other assets was $1,205,-761.17, making a total of $22,580,761.17; and allowed to the

stockholders a participation in the stock of the reorganized company (R. 177).

On December 4, 1945 the District Court approved the Trustee's plan as amended (R. 175). The plan was thereupon submitted to the security holders for their vote. Of those qualified to vote, 84% of the stockholders, 99% of the debenture holders, and 100% of the second mortgage bondholders, voted in favor of it (R. 244-247).

On May 13, 1946 the District Court confirmed the plan, with the approval of all interested parties, including the common stockholders' committee, which had actively participated in the proceeding throughout (R. 261). No appeal was ever taken from such order of confirmation.

On June 7, 1946 the Court entered an order appointing Empire Trust Company as Trustee under the new second mortgage indenture provided for under the plan. On June 24, 1946 the Court entered an order approving documents in consummation of the plan, and directing the Trustee to execute and file a certificate of incorporation of the new company, and to take the steps required to qualify the new company to do business in New York (R. 268).

On July 8, 1946 the District Court entered a formal order of consummation of the plan of reorganization. This order fixed the effective date of the consummation of the plan of reorganization at July 1, 1946 (R. 273).

Confirmed Plan of Reorganization

The debtor's capitalization consists of the following (R. 427):

First Mortgage	$15,880,543.35
Second Mortgage Bonds	3,000.00
Debentures	4,754,000.00
Accrued interest on Debentures to January 1, 1947	1,188,500.00
Common Stock	862,098 shares

Under the confirmed plan of reorganization, the treatment of the security holders is as follows (R. 181):

(a) The first mortgage is to be undisturbed.

(b) The second mortgage bonds are to be paid in cash.

(c) The $4,754,000 of debentures are to receive:

1. $2,852,400, or 60% of principal, in new 5% income bonds convertible for a period of three years into 456,384 shares of common stock and for two years thereafter into 285,240 shares (conversion price being about $6.25 per share for the first period and $10 per share for the later period), and

2. 475,400 shares of common stock, being 100 shares for each $1,000 debenture.

(d) The common stock will receive one share of new common stock for each 10 shares of old, or a total of 86,210 shares of new stock.

The total amount of principal and accrued interest due on the debentures (as of January 1, 1947) is $5,942,500, or $1,250 for each $1,000 debenture. The portion of the claim of each $1,000 debenture and accrued interest which is not being satisfied by the issuance of each $600 principal amount of new bonds, is about $650, for which there will be issued 100 shares of new stock. This assumes a reorganization value for the new stock of about $6.50 per share.

Under the confirmed plan, no part of the existing working capital of the debtor is being depleted to satisfy the outstanding debentures.

Substantial Consummation of Confirmed Plan

After the order of confirmation, the following acts were done under the order of the Court to consummate the plan (R. 29):

(a) A new corporation was organized under the laws of the State of Maryland;

(b) The incorporators met and adopted the necessary resolutions to put the corporation in business;

(c) The new Board of Directors, approved by the Court (R. 266), met on several occasions, assumed de facto control of the property and assets of the debtor, designated officers who were approved by the Court and took all steps necessary to facilitate the business of the corporation;

(d) A listing application was made to the New York Stock Exchange to list the new stock of the corporation. This application was granted subject to transfer of the properties;

(e) The new corporation applied for and obtained permission to do business in New York;

(f) A Trustee under the New Second Mortgage was appointed by the Court;

(g) The New Corporation retained, with Court approval, a transfer agent and registrar of the stock of the New Company;

(h) The New Indenture had been drawn and application to qualify it had been filed with the Securities and Exchange Commission, and no deficiency letter was received within the statutory time period, and the Indenture became qualified;

(i) The new securities of the New Company had been prepared and were ready for delivery to the security holders of the debtor;

(j) All documents to carry out the plan had been drawn and approved by the Court and by all parties in interest;

(k) On July 8, 1946 the Court below signed the order of consummation (R. 273) in which it fixed the effective date of the plan as July 1, 1946 (R. 274);

(l) By the order of consummation the Court below fixed the amount of cash to be turned over to the New Company (R. 278) cancelled defaults and arrears against the debtor prior to July 1, 1946 (R. 278); directed the transfer of the debtor's property to the New Company and authorized and directed the respective parties to sign and deliver a deed, bill of sale, mortgage and any and all documents necessary to consummate the plan (R. 279).

All documents had been prepared and were ready for signature and delivery at the time of respondents' applications. There remained merely the ministerial act of signing and delivering three documents,—documents which the Court had directed to be signed and delivered merely to clear the record title to the real estate.

The plan had in effect been consummated.

New Proposal by the Stockholders and the Debtor

After the expiration of the time to appeal from the order of confirmation, and after substantial consummation of the confirmed plan as above indicated, the stockholders and the debtor, the respondents above named, filed a series of petitions in the District Court for leave (a) to modify the confirmed plan of reorganization, (b) to vacate the order of confirmation, (c) to vacate the order of consummation of the plan, and (d) to dismiss the proceeding. The said petitions contained no allegations of any change in the value of the debtor's property or of any mistake, inadvertence, surprise or excusable neglect. The District Court, after full hearings on two days, entered orders denying these applications on July 16 and July 31, 1946, respectively.

The new proposal of the stockholders and the debtor (R. 429) would treat the security holders as follows: For each 10 shares of old common stock, there would be issued one new share, as under the confirmed plan. In order to raise funds to satisfy in full the claims of the debenture holders, it is proposed that:

1. The stockholders be given the right for each share of existing stock to subscribe to a total of 862,094 new shares of stock at $6 per share, which would raise $5,172,588, and

2. The balance of $769,912 would be taken from the treasury of the debtor corporation.

The offer to stockholders at $6 per share was to be underwritten by City Investing Company, a corporation engaged in owning and managing real estate, which would receive as a bonus 69,686 shares of new common stock. With the money thus raised, the debentures would be paid in cash.

Thus there would be taken from the debenture holders the stock allocated to them, presently and upon conversion, under the confirmed plan of reorganization, so that such stock could be offered to the stockholders under the proposed underwriting plan. If the stockholders did not subscribe to this stock, then City Investing Company would become the owner of 862,094 shares at $6 a share, and would in any event receive as a bonus 69,686 shares.

The underwriting commitment, which was the basis of the proposed plan, was subject to many conditions and was limited to a period of ninety days which expired on October 15, 1946. The underwriting lapsed prior to the time the appeals were heard by the Circuit Court of Appeals and has not been renewed, and at the present time there is no semblance of a commitment either by City Investing Company or anyone else.

The stockholders and the debtor appealed to the Circuit Court of Appeals for the Second Circuit from the orders of the District Court denying their applications. The Circuit Court, by judgments entered December 31, 1946

and January 28, 1947, respectively, and by ancillary order entered January 28, 1947, reversed the District Court. The decisions of the Circuit Court direct the following (R. 435):

> "Upon remand the question will be whether the City Investing Company—or for that matter any other equally responsible underwriter—will within a reasonable time come forward with a reliable and practical offer which will produce enough money to pay off the debenture bonds, principal and interest. If such an offer is forthcoming, it should be treated as a permissible 'alteration' or 'modification' of the plan under § 222, and the judge should 'approve' it, provided he finds that it satisfies the conditions we have just mentioned."
>
> (*Knight et al.* v. *Wertheim et al.*, 158 F. 2d 838; at p. 844.)

The Effect of the New Proposal Upon the Essential Working Capital and Reserves of the New Company

The confirmed plan provides that the cash on hand at consummation shall be utilized, after administration and operating expenses, for the following purposes:

Working capital	$225,000
Reserve Fund for capital improvements	250,000
Reserve Fund to assure against possible foreclosure of the first mortgage	750,000
Total working capital and reserves	$1,225,000

All parties including the Trustee and the Securities and Exchange Commission considered these items essential to the preservation of the property and continuance of the business of the reorganized company. The working capital is moderate indeed. The improvement fund is essential for a building thirty years old in order to maintain the

building properly and to meet competition of newer structures. The reserve fund is vital in order to insure that the company will be able to pay $992,000 each year to the first mortgagee as the required interest and amortization, and thus avoid foreclosure of the first mortgage. During the years 1941, 1942, 1943 and 1944 the Trustee protected himself from default under the first mortgage only because of the provisions of the New York State Mortgage Moratorium Law.

The proposed plan would divert $769,912 cash from the working capital and reserve funds of the reorganized company, and there would be a danger of default under the first mortgage, as the result of which all stockholders would be foreclosed and eliminated.

Counsel for the Securities and Exchange Commission recognized the advantages in the reserve funds provided for under the confirmed plan. He stated:

> "There are other provisions in the plan [the confirmed plan] * * * which are aimed to protect the investment of the debenture holders by reducing the funded debt and rehabilitating the building as fast as may be possible" (R. 309).
>
> "However, the mortgage is owned by the Equitable Life Assurance Society, and they have insisted upon their pound of flesh, and under the law there is no way that that mortgage can be reduced except by the application of earnings to the reduction of its principal. And that Mr. Duncan [the Trustee] has attempted to insure by the cautionary provision in his plan of reorganization" (R. 319).

The Trustee, who had to rely upon the New York Moratorium Law to avoid the consequences of default for the four year period from 1941 to 1944, has recognized the dangers to the reorganized company if it is stripped of essential working capital and reserve funds. He stated:

> "In the fiscal years of the Corporation for 1943 and 1944 the Corporation did not earn the amount of the interest and required yearly amortization of that

> mortgage. The amount required to be paid each year until the mortgage is completely paid is an aggregate of $992,000 (approximately $1,000,000) including interest and amortization. I have endeavored to obtain a change in the terms of the mortgage but have been unsuccessful. The Assurance Society has refused to reduce the interest rate or change the amount of amortization" (R. 231).

The District Court, in discussing the new proposal, recognized the importance to the reorganized company of being in a strong financial position, saying:

> "I should be greatly distressed if a plan such as is suggested here were to go through, and then ultimately for it to develop that a loan would be required to take care of the necessities of the corporation, which might result then in allowing all the stock publicly held to be wiped out" (R. 98).

The Court further stated that it could not consider the proposed plan

> "unless I have assurance that the mortgage debt can be taken care of in full plus all these other expenses and obligations, and the proposal of the underwriters will have to include that, and they will have to take a chance as to what my discretion may be on making allowances" (R. 68).

Notwithstanding the above views expressed by the Court, counsel for the Securities and Exchange Commission, and the Trustee, neither the underwriter nor the above-named respondents made any effort to have the proposed plan provide for the essential working capital and reserve funds.

Despite the foregoing, the Circuit Court of Appeals in reversing the District Court stated in 158 F. 2d 838, at page 844:

> "The amount of cash which would be left to carry on was necessarily speculative; but the prospect was undoubtedly of a much smaller margin than had been the company's habit in the past; perhaps it was so small that a majority of the shareholders would have

preferred to take 10 per cent of their holdings, and let the option go. That was, however, not a question for the debenture holders or for the trustee; indeed, it was not even a question for the judge. It was for a majority of the shareholders, and for them alone, to decide whether they preferred to accept the chance of being able to pay the interest on the first mortgage; and if they chose to do so, the judge would not have been justified in interfering in their choice; it was a practical decision within the powers of the majority; Chapter X does not give to the bankruptcy court any larger supervision in such a situation than if the new company had been set up and sent upon its way."

The Nature of the Underwriting under the New Proposal

Under the purported underwriting agreement there was no obligation to purchase any of the shares unless, within 90 days, *i. e.*, prior to October 15, 1946, the proposed plan was finally confirmed, consummated by the transfer of the properties, any rights to appeal had expired or any appeals been disposed of, and the new stock offered to the stockholders and delivered to the underwriter to the extent unsubscribed by the stockholders, together with 69,686 shares of free stock (R. 156). It is clear that a period of time much longer than 90 days would be necessary before such conditions could be complied with. In order to consummate any newly proposed plan it will be necessary to take the many steps already considered, including a hearing on the merits, a further notice to security holders, reference to the Securities and Exchange Commission, approval by the Court, submission to security holders for acceptance, and a hearing on confirmation. Obviously, any commitment for ninety days was, as a practical matter, an empty gesture. It is believed that nothing less than a commitment for an indefinite period until the final determination of the proceedings would have constituted a real commitment.

Questions Presented

1. After the plan had been confirmed under Chapter X of the Bankruptcy Act and, no appeal having been taken, the plan had been substantially consummated, could such plan be changed without the consent of the debenture holders, to eliminate the provision that debentures shall be satisfied in stock and income bonds convertible into stock, and substitute therefor a new proposal for payment of the debentures in cash partly out of the treasury of the corporation and partly by offering to the stockholders, under an underwriting arrangement, the stock previously allotted to the debentures?

2. Was the District Court required to approve such new proposal and direct its submission to a vote of the stockholders, without regard to the fact that the confirmed plan was substantially consummated, and without regard to the feasibility of the new proposal in view of the limited time and other conditions of the underwriting and the doubt that it would provide sufficient funds to pay off the debentures without stripping the reorganized company of quick assets necessary to carry on its business?

3. Was it an abuse of discretion by the District Court to refuse to reopen the reorganization proceedings upon the submission of such limited and conditioned underwriting, after the expiration of the time to appeal from the order confirming the plan and after substantial consummation of the plan, and in view of the other record facts in the case?

4. Was the Circuit Court of Appeals in error in holding that the question of fairness and feasibility of such new proposal was exclusively for determination by a majority of the stockholders, and of no concern to the District Court?

5. Did the Circuit Court of Appeals err in refusing to dismiss the appeals from the orders of the District Court and in reversing such orders, where it appeared prior to argument of the appeals that the underwriting offer, on which the proposed changes in the confirmed plan were predicated, had expired, and there was no showing that such underwriting offer would be renewed, or that any similar offer might be obtained?*

6. Were the petitions by the stockholders and the debtor in reality requests for rehearings so that the orders denying the same were not appealable to the Circuit Court of Appeals?

Reasons for Granting the Writs

It is submitted that this Court should grant the writs of certiorari herein for the following reasons:

1. The Circuit Court of Appeals has decided important questions arising under Chapter X of the Bankruptcy Act which have not been, but should be, settled by this Court. Among these questions are:

(a) The effect of confirmation of a plan of reorganization as fixing the rights of security holders.

(b) The circumstances under which a plan after confirmation and substantial consummation, may be altered or modified under Section 222 of the Bankruptcy Act.

(c) The function of the reorganization court to pass upon the fairness, equitableness and feasibility of pro-

* Under date of November 9, 1946 the petitioners filed with this Court a suggestion of mootness and urged that the petitions for writs of certiorari filed by the above-named respondents with this Court (609, 610 and 612—October Term 1946) should be denied and the stay granted by Mr. Justice Reed August 6, 1946 should be vacated upon the ground that the questions presented to this Court upon such petitions are purely hypothetical, in view of the absence of any underwriting commitment to support the new proposal.

posed changes in a confirmed plan of reorganization before submission of these changes to a vote of the security holders.

(d) The right of a debtor and its stockholders, after confirmation and substantial consummation of a plan, to substitute a proposed new plan for payment of creditors, in lieu of the securities allotted to them under the confirmed plan.

Under date of August 6, 1946 Mr. Justice Reed of this Court entered an order staying the consummation of the confirmed plan of reorganization herein, pending determination by this Court of three petitions for writs of certiorari filed by the respondents above named (Nos. 609, 610 and 612—October Term 1946), which stay is still in full force and effect. These petitions for writs of certiorari are still pending, in part undetermined, in this Court. The opinion of Mr. Justice Reed in connection with the granting of such stay projected a number of questions, including those above mentioned, which he stated required final determination. Reference is made to this opinion printed at page 362 of the record herein. An early authoritative decision of these questions by this Court is of great importance, not only to the parties to this proceeding and to the hundreds of holders of securities of the debtor, but also to the numerous other debtors which are presently in proceedings under Chapter X, to the holders of their securities, to United States District Courts in the supervision of such proceedings and the administration of the Bankruptcy Act, and to the Securities and Exchange Commission in the conduct of the functions with which it is charged under Chapter X of said Act.

2. The Circuit Court of Appeals has decided the question of the extent to which a plan, after confirmation, may be changed under the provisions of Chapter X of the Bankruptcy Act, in a way probably in conflict with applicable decisions of this Court. Heretofore, this Court has declined to reopen a confirmed plan of reorganization, on the

basis of alleged changed circumstances, in a full opinion rendered February 3, 1947 in the case entitled *Insurance Group Committee* v. *Denver and Rio Grande Western Railroad Company,* No. 690—October Term 1946, 91 Law Ed., 436. Quite recently, this Court has denied certiorari to review plans of reorganization affecting St. Louis-San Francisco Railway Co., Chicago, Rock Island and Pacific Railway Company and St. Louis Southwestern Railway Company; in which cases reopening of the plans was sought upon the ground of alleged changed circumstances and increased earnings since the approval of the plan involved therein.

3. The Circuit Court of Appeals for the Second Circuit has rendered a decision in this case which is in apparent conflict with decisions of the same and other Circuit Courts of Appeals on the same matter. This pertains particularly to the interpretation given by the Circuit Courts of Appeals under Section 222 of the Bankruptcy Act and under former Section 77B (f). In *Country Life Apts.* v. *Buckley,* 145 F. 2d 935 (C. C. A. 2nd, 1944), the Second Circuit held that the appellant's proposals did not in effect constitute modifications of the approved plan, but clearly constituted a newly proposed plan, which could not be considered after approval of the Trustee's plan. In *Diversey Building Corp.* v. *Metropolitan Trust Company,* 141 F. 2d 65 (C. C. A. 7th, 1944), the Seventh Circuit interpreted subdivision (f) of Section 77B of the Bankruptcy Act to mean such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation. In *Rogers* v. *Consolidated Rock Products Co.,* 114 F. 2d 108, 111 (C. C. A. 9th, 1940) the Court said that a proposal of an alternative plan after the entry of an order confirming a plan came after "all reasonable time for such proposals of alternative plans had long expired". The First Circuit Court reached a similar conclusion in *Downtown Inv. Ass'n* v. *Boston Metropolitan Bldgs.,* 81 F. 2d 314 (C. C. A. 1st, 1936).

The Circuit Court in this case denied any degree of finality to the order of confirmation, holding that a confirmed plan may be altered or modified at any time before final decree discharging the Trustee and closing the estate (often necessarily delayed for a year or two after consummation of the plan in order to complete actions or proceedings pending in the name of or against the Trustee). The Circuit Court stated that such alteration or modification (R. 431):

> "must be to some extent congruent with the plan. We cannot, however, agree that there are narrower or more definite limits than this."

The result of this holding of the Circuit Court is to cast a cloud upon all securities issued upon consummation of a plan, and to render transactions in such new securities uncertain and impractical, until the entry of the final decree.

4. The Circuit Court of Appeals in its decision herein has so far departed from the accepted and usual course of judicial proceedings, and has so far directed such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

(a) The Circuit Court has taken upon itself the exercise of discretion with which the Circuit Court is not invested, and has been impelled to hold that the District Court abused its discretion in the premises, contrary to the weight of the facts and circumstances considered by the District Court. It is a fundamental rule that an exercise of discretion by a District Court will not be disturbed upon appeal except for a clear showing of abuse of discretion. This is an important fundamental rule in the administration of cases by the District Court, particularly in bankruptcy matters.

(b) The judgments of the Circuit Court of Appeals directing the District Court in this case to approve a new proposal, thereby depriving the District Court of

jurisdiction to determine the questions of fairness, equitableness and feasibility of the proposed plan, and to relegate such questions entirely to the vote of the security holders, is in violation of Section 221, subdivision (2) of the Bankruptcy Act. Under that section it has been uniformly held that the determination of these aspects of a plan are exclusively within the jurisdiction of the District Court for the protection of the security holders as a whole.

(c) The Circuit Court of Appeals committed error in denying petitioners' application to dismiss the appeals in that Court upon the ground that they had become moot, since the offer of the underwriter had long since lapsed and there was then in existence no outstanding underwriting. It has been uniformly held in this Court that Appellate Courts should not be permitted to render a declaratory judgment on purely hypothetical questions. This is especially true where the Appellate Court is being requested to render such a declaratory opinion in order to set aside a plan that has been confirmed and practically consummated.

(d) The Circuit Court of Appeals exceeded its power in entering the judgments reversing the decree of the District Court for the purpose of keeping suspended, *in vacuo,* the order of the District Court confirming the plan of reorganization herein, in order to give stockholders an opportunity to cast about for an underwriting upon which to support their new proposal. The Circuit Court was required to pass on the merits of the cause as it came to it upon the record, and the controversy between the parties having lapsed by reason of the expiration of the underwriting, the Circuit Court was required to dismiss the appeals for mootness in the absence of any existing justiciable controversies. It has been uniformly held in this Court that an appeal should not be entertained where it presents no actual controversy involving real or substantial issues.

Conclusion

For the above-named reasons, it is respectfully submitted that certiorari should be granted, directed to the United States Circuit Court of Appeals for the Second Circuit, to review the aforesaid judgments of that Court dated December 31, 1946 and January 28, 1947, respectively, and the ancillary order of that Court dated January 28, 1947.

Dated, March 27, 1947.

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The undersigned do hereby join in the foregoing petition for writs of certiorari:

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BRIEF IN SUPPORT OF PETITION

POINT I

The case involves important questions in the construction of Chapter X of the Bankruptcy Act which should be decided by this Court.

The opinion of Mr. Justice Reed in this case, dated August 6, 1946, leaves open the following questions for determination by this Court:

1. "The debenture holders' legal defenses are (1) that the rights of the debenture holders vested on confirmation of the plan, C.X, sec. 224 and (2) that the action of the district court in denying applicants' petitions was within its discretion. See Pewabic Mining Co. v. Mason 145 U. S. 349, 366, 367."

2. "Thus it may be held that confirmation of the plan fixes rights thereunder as between the creditors (debenture holders) and stockholders, subject to review on appeal from the order of confirmation; that the later transfer of the property frees it and the contemporaneous final order terminates stockholders interest in the debtor."

3. "When no fraud or other unfair practices or acts are charged to the beneficiaries of the confirmation, as is the situation in these proceedings, rights acquired by confirmation of a plan may be secure from change unless gross injustice is shown."

4. "It may be determined that present debenture holders carry the risk of profit or loss after confirmation and therefore are entitled to any increased value."

5. "The effect of unanticipated changes of economic conditions after confirmation on the propriety of subsequent action by the reorganization court to protect the interest of junior creditors also has not been judi-

cially determined, finally. Compare R. F. C. v. Denver & R. G. W. R. Co., 90 L. Ed. 1134, 1148; Ecker v. W. P. R. Co., 318 U. S. at 506-509."

6. "I think the stockholders are entitled to have determined the question of power in the district court to grant their petitions, and, if the power exists, the propriety of its exercise under the circumstances alleged or the facts that may be developed on a hearing. Widely shifting values make the issues of general importance in pending reorganizations under Chapter X. This determination can only be obtained after decisions by the Circuit Court of Appeals."

POINT II

The decision of the Circuit Court of Appeals in this case is at variance with the decisions of this Court in analogous situations.

The decisions in this Court in the following cases, where there was a refusal to open up approved plans on the alleged ground of changes in economic conditions and earnings of the various companies involved therein, are in principle at variance with the decision of the Circuit Court of Appeals in the instant case:

Insurance Group Committee v. *Denver and Rio Grande Western Railroad Co.,* No. 690—October Term 1946, 91 Law. Ed. 436;

St. Louis-San Francisco Railway Co. v. *James H. Brewster,* No. 638—October Term 1946, 91 Law. Ed. 76;

Gerald Axelrod v. *Joseph B. Fleming,* No. 791—October Term 1946, 91 Law. Ed. 550; and

St. Louis, Southwestern Railway Company v. *Berryman Henwood,* No. 936—October Term 1946.

POINT III

The decision of the Circuit Court of Appeals in this case is at variance with the decisions of the same and other Circuit Courts of Appeals in analogous situations.

In the cases hereinafter cited, the Circuit Courts of Appeals of the First Circuit, the Second Circuit, the Seventh Circuit and the Ninth Circuit have without exception held that amendments and modifications permissible under Section 222 and under former Section 77B (f) are only "such changes as will better aid in carrying out the plan which has been finally confirmed."

Thus in *Diversey Bldg. Corp.* v. *Metropolitan Trust Co.*, 141 F. 2d 65, 68, the Circuit Court for the 7th Circuit said in a Section 77B proceeding:

> "We cannot accept appellant's interpretation of subsection f of this Act. We are convinced that Congress did not intend that a debtor corporation should be permitted to ask for a radical change of a plan of reorganization after it had been confirmed by the court and was being executed under the court's supervision
> * * *
> "We interpret subsection f to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation, and in no event shall any change be made without the consent of the court."

In *Country Life Apts.* v. *Buckley,* 145 F. 2d 935 (a case under Chapter X, in which the facts were similar to those here involved), the Circuit Court for the 2nd Circuit held that changes which do not aid in carrying out an approved plan, but are so extensive as to constitute a new plan, may not be entertained even before confirmation, and *a fortiori*

may not be made after confirmation and partial consummation, as in the present case. The Court said at page 937:

> "Since there is no similar provision for submission or filing of any other plan subsequent to approval, at least not until ultimate disposition of the approved plan, it follows that the time for offering substitute plans expired with approval of the trustee's plan; and proposals offered thereafter could be only in the nature of a modification of such approved plan. Bankruptcy Act, § 222.
>
> "Appellants' proposals filed by way of objections, however, differed so greatly from the trustee's plan that they could not possibly be treated as a mere modification. In providing for the transfer of the debtor's property to a new corporation, and the extinguishment of a great number of claims in exchange for shares in that corporation, as a substitute for the trustee's proposed outright sale and full cash payment of all the claims, appellants' proposals clearly constituted a newly proposed plan, which could not be offered at this late stage of the proceedings. Downtown Inv. Ass'n v. Boston Metropolitan Bldgs., 1 Cir., 81 F. 2d 314, 321. Upon ascertaining this fact, the District Court was not required to listen to further arguments on the merits of the proposals, and hence committed no error in denying appellants further opportunity to be heard."

In *Rogers* v *Consolidated Rock Products Co*, 114 F. 2d 108, 111 (C. C. A. 9th, 1940) the Court said that a proposal of an alternative plan after the entry of an order confirming a plan came after "all reasonable time for such proposals of alternative plans had long expired." The First Circuit Court reached a similar conclusion in *Downtown Inv. Ass'n* v. *Boston Metropolitan Bldgs.*, 81 F. 2d 314 (C. C. A. 1st, 1936).

POINT IV

Clear error was committed by the Circuit Court of Appeals in several respects which can be corrected only by review of this Court.

As shown in the petition annexed hereto, error was committed by the Circuit Court in the following respects:

(a) The Circuit Court of Appeals held that the changes in the confirmed plan proposed by the stockholders and the debtor constituted a modification within the meaning of Section 222 of the Bankruptcy Act which the District Court in its discretion had the power to approve, and the Circuit Court of Appeals recognized that in refusing to approve such changes the District Court had acted in the exercise of its discretion. The Circuit Court of Appeals then proceeded to hold that the District Court had abused its discretion in the matter. When the opinion of the Circuit Court of Appeals is analyzed, however, it is apparent that the effect of the decision is to leave no field for the exercise of discretion by the District Court, but rather to require it to approve changes of the character proposed herein, whenever requested by the stockholders or the debtor. For example the Circuit Court of Appeals overruled the District Court on the point that the length of time the proceedings had been pending, the deliberations had in arriving at the confirmed plan, and the opportunity given to all parties to be heard in connection therewith, were reasons for denying the application. It also overruled the District Court in deciding that the unfeasibility of the new proposal warranted its rejection by the District Court in its discretion. It also overruled the District Court in its decision that a decree solemnly and deliberately arrived at should not be lightly overthrown or cast aside. All of these matters would seem to be legitimate matters of consideration by the District Court

in the exercise of discretion, and the net result of the Circuit Court of Appeals decision is really to take this matter out of the realm of discretion and to make it mandatory on the District Court to accept any underwriting of like character to that presented in this situation. The decision clearly conflicts with the provisions of Section 222 of the Bankruptcy Act which contemplates that any modification of the confirmed plan must be approved by the District Court before it is submitted to the security holders. There could be no reason for an approval by the District Court unless that Court were to be given some room for exercising discretion in giving or withholding such approval.

It has been uniformly held that amendment of a plan of reorganization is not a matter of right, but is within the sound discretion of the District Court. The Court's granting or denial of petitions for amendment of a plan, like other discretionary powers in bankruptcy, is appealable only for a proven abuse of that discretion.

North American Car Corp. v. *Peerless W. & V. Machine Corp.*, 143 F. 2d 938, 940 (C. C. A. 2nd, 1944);

Hurd Committee v. *Prudence Realization Corp.*, 150 F. 2d 477, 479 (C. C. A. 2nd, 1945); cert. denied, 326 U. S. 734 (1945);

Mohonk Realty Corp. v. *Wise Shoe Stores*, 111 F. 2d 287, 289 (C. C. A. 2nd, 1940); cert. denied, 311 U. S. 654 (1941);

Diversey Bldg. Corp. v. *Metropolitan Trust Co.*, 141 F. 2d 65, 69 (C. C. A. 7th, 1944);

Country Life Apartments v. *Buckley*, 145 F. 2d 935, 937 (C. C. A. 2nd, 1944);

In re Schreiber, 23 F. 2d 428, 430 (C. C. A. 2nd, 1928).

In *Reconstruction Fin. Corp.* v. *Denver & Rio G. W. R. Co.*, 90 Law. Ed. 1134 (1946), the Supreme Court, in reversing a mandate of the Circuit Court of Appeals which had overruled a finding by the District Court that the plan was "fair and equitable", said (p. 1154):

> "In view of the District Judge's familiarity with the reorganization, this finding has especial weight with us. See Rule 52, Federal Rules of Civil Procedure."

See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142 (1944).

It is manifest that the District Court clearly exercised its sound discretion, when it decided (R. 99):

> "The deliberate and fully considered adjudication of a responsible court made and entered without objection on the part of any person in interest—and after all parties were afforded ample opportunity to be heard on the merits of the issues involved—and when they and the public—as they had a right to do—confidently relied upon its integrity, should be something more stable than a weather vane on a blustery day in March. For this reason, my consummation order of July 8, 1946, will stand. It follows that the application to reopen the reorganization proceedings of the debtor will be denied."

(b) The Circuit Court took from the District Court and vested in the stockholders the power of the District Court to pass upon the fairness, equitableness and feasibility of the proposed new plan. As pointed out in the accompanying petition, the Circuit Court said with respect to the financial condition of the reorganized company under the proposed new plan and the possibility of its survival after consummation of the newly proposed reorganization:

> "The last question remains; whether the new company would have been so stripped of quick assets that it might prove unable to carry on its business: i. e.,

> that its cash resources would have been at the danger point. * * * That was, however, not a question for the debenture holders or for the trustee; indeed, it was not even a question for the judge. It was for a majority of the shareholders, and for them alone, to decide whether they preferred to accept the chance of being able to pay the interest on the first mortgage; and if they chose to do so, the judge would not have been justified in interfering in their choice; * * *" (*Knight et al.* v. *Wertheim & Co. et al.*, 158 F. 2d 838, 844).

Further, the Circuit Court directed that upon remand, if the City Investing offer is reinstated or any other similar offer made to pay off the debenture bonds, principal and interest,

> "the judge should 'approve' it, provided he finds that it satisfies the conditions we have just mentioned" (p. 844).

The only condition of approval specified in the Circuit Court's opinion is that the new offer should "produce enough money to pay off the debenture bonds, principal and interest". The Circuit Court deprives the District Court of jurisdiction to pass upon the fairness and equitableness of any new proposed offer in so far as it may relate to the bonus to be paid to the underwriter, the subscription price at which the stock is to be offered to the stockholders, and whether under any offer of subscription the stockholders would be paying a price substantially higher than the valuation of the property fixed by the Court.

Further, by its action the Circuit Court vitiates the spirit of Chapter X by vesting in the stockholders the power to issue new securities, not subject to approval by the District Court, and not subject to registration with the Securities and Exchange Commission. Thus the stockholders would claim the benefit of exemption from the Securities Act of 1933 afforded by Chapter X, but without

being subject to the burden of court approval and review required by Chapter X.

Finally, the Circuit Court relegates to the stockholders the power to pass on the question of the feasibility of any new proposal. In the opinion of the Circuit Court, the District Court is enjoined from passing on the questions of whether the reorganized company under the proposed new plan would be able to continue in existence, whether it could pay the $1,000,000 annual charges on the first mortgage, whether the building could be kept up to date and rehabilitated to meet present-day competition, or whether under the proposed new plan there might result a foreclosure of the first mortgage in the foreseeable future. The Circuit Court said that this "was not even a question for the judge. It was for a majority of the shareholders, and for them alone, to decide whether they preferred to accept the chance of being able to pay the interest on the first mortgage * * *."

Section 221 of the Bankruptcy Act provides:

> "Section 221. The judge shall confirm a plan if satisfied that * * *
> (2) the plan is fair and equitable, and feasible; * * *"

Section 222, relating to alterations or modifications of a confirmed plan of reorganization, provides in part as follows:

> "The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with."

Clearly, the District Court has jurisdiction over an altered plan under Section 222, the same as over an original plan under Section 221. In other words, the Court

may confirm an altered plan of reorganization only if satisfied that "the plan is fair and equitable, and feasible".

The decision by the Circuit Court of Appeals herein is apparently in conflict with the decisions of this Court in *Case* v. *Los Angeles Lumber Company*, 308 U. S. 106, and *Group of Institutional Investors, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523. In the present case the Circuit Court has held that the financial ability of the reorganized company to fulfill its obligations after consummation of the proposed plan is a matter for determination exclusively by the stockholders. However, in *Case* v. *Los Angeles Lumber Company, supra*, at page 114, this Court said:

> "At the outset it should be stated that where a plan is not fair and equitable as a matter of law it cannot be approved by the court even though the percentage of the various classes of security holders required by § 77B (f) for confirmation of the plan has consented. It is clear from a reading of § 77B (f) that the Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be 'fair and equitable.' The former is not a substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders."

The conflict between these two decisions is clear. The determination by the Circuit Court in the instant case precludes the application of these rules by the reorganization court, strips it of power to consider fairness and feasibility of the proposed plan, and submits the question exclusively for determination by stockholders. This cannot be supported as having been the intention of Congress in the enactment of Chapter X.

(c) The Circuit Court did not have the right to deny petitioners' motions to dismiss the appeals pending in that Court upon the ground of mootness. The underwriting having expired, there was no new plan and no ques-

tion before the Circuit Court for determination, and the appeals should have been dismissed.

U. S. v. *Alaska Steamship Co.*, 253 U. S. 113;
Mills v. *Green*, 159 U. S. 651;
Security Life Ins. Co. v. *Prewitt*, 200 U. S. 446;
Richardson v. *McChesney*, 218 U. S. 487.
California v. *San Pablo & Tulare R. R.*, 149 U. S. 308.

In the last case, this Court said at page 314:

> "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

(d) The Circuit Court did not have the power to hold the confirmed plan of reorganization in suspended animation while the stockholders were groping about for an underwriting that might support a new plan of reorganization.

Judicial Code, Section 128 (28 U. S. C. A. § 225).

In *United States* v. *Hamburg-American Co.*, 239 U. S. 466, this Court said at page 475:

> "But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide an existing controversy, but to exercise a rule for controlling predicated future conduct, contrary to the elementary principle which was thus stated in *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308, 314."

POINT V

The motion to vacate the order of confirmation was in effect a motion for a rehearing. An order denying a rehearing is not appealable.

While it is clear by the decisions of this Court that the District Court has power to grant motions for rehearings out of term, it is equally clear that neither a refusal to entertain such a motion, nor a denial of such a motion, if entertained, is appealable. *Wayne Gas Co.* v. *Owens-Ill. Glass Co.*, 300 U. S. 131, 137 (1937); *Pfister* v. *Northern Ill. Finance Corp.*, 317 U. S. 144, 149-50 (1942); *Conboy* v. *First Nat. Bank*, 203 U. S. 141, 145 (1906).

The same rule applies to motions to reopen, *Wragg* v. *Fed. Land Bank*, 317 U. S. 325, 327 (1943); motions to modify, *Old Colony Tr. Co.* v. *Kurn*, 138 F. 2d 394, 395 (C. C. A. 8th, 1943); motions to vacate, *Brown* v. *Thompson*, 150 F. 2d 171, 172 (C. C. A. 8th, 1945); and all like motions, however denominated.

The motions for a vacation of the order of confirmation were not based upon alleged mistake, gross inequity, fraud, or similar grounds; nor were said motions based on any allegation that the confirmed plan is not fair and equitable or not feasible. A new plan is desired merely because the respondents believe that such new plan may afford some additional benefits to some stockholders.

Such motions are clearly in the nature of motions for a rehearing on confirmation of the plan. As such, denial thereof is not appealable.

It is accordingly respectfully submitted that the writs of certiorari should be allowed by this Court.

Dated, March 27, 1947.

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Of Scribner & Miller,
Attorneys for Harry R. Amott, *et al.*,
Petitioners.

HENRY S. HOOKER,
Attorney for J. Donald Duncan,
Trustee, Petitioner.

Appendix

Sec. 24c. of the Bankruptcy Act: (11 U. S. C. A., § 47c)

The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals of the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

Sec. 240a of the Judicial Code: (28 U. S. C. A., § 347a)

Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Sections of Chapter X of the Bankruptcy Act

Article XI—Confirmation and Consummation of Plan

Sec. 221. The judge shall confirm a plan if satisfied that—

(1) The provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) The plan is fair and equitable, and feasible;

(3) The proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) All payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) The identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

SEC. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

SEC. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

SEC. 224. Upon confirmation of a plan—

(1) The plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) The debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) If the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) Distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a)

proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

SEC. 225. Where the claims or stock specified in paragraph (4), clause (b), of section 224 of this Act are objected to by any party in interest, the objection shall be heard and summarily determined by the Court.

SEC. 226. The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

SEC. 227. The court may direct the debtor, its trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

SEC. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) Discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) Discharging the trustee, if any;

(3) Making such provisions by way of injunction or otherwise as may be equitable; and

(4) Closing the estate.

Federal Rules of Civil Procedure.

Rule 60. Relief from Judgment or Order.

(b) *Mistake; inadvertence; surprise; excusable neglect.* On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C. Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

Sec. 128 of the Judicial Code (28 U. S. C. A. § 225):

(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 1168, 1169, 1170, 1172, 1173, and 1174

HUDSON McGUIRE, *et al.*, Debenture Holders; and HARRY R. AMOTT, *et al.*, Committee of Debenture Holders; and J. DONALD DUNCAN, Trustee,

Petitioners,

against

EQUITABLE OFFICE BUILDING CORPORATION, Debtor; and ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders; and CHARLES A. DANA, *et al.*, Committee of Common Stockholders,

Respondents.

BRIEF OF STOCKHOLDERS KNIGHT AND DOYLE IN OPPOSITION TO PETITIONS FOR CERTIORARI

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Supreme Court of the United States

HUDSON MCGUIRE, *et. al.*, Debenture Holders; and HARRY R. AMOTT, *et. al.*, Committee of Debenture Holders; and J. DONALD DUNCAN, Trustee,

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EQUITABLE OFFICE BUILDING CORPORATION, Debtor; and ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders; and CHARLES A. DANA, *et al.*, Committee of Common Stockholders,

Respondents.

BRIEF OF STOCKHOLDERS KNIGHT AND DOYLE IN OPPOSITION TO PETITIONS FOR CERTIORARI

This brief is filed on behalf of Adelaide H. Knight and William P. Doyle, common stockholders, in opposition to the petitions for certiorari filed

(a) by Hudson McGuire, et. al., Debenture Holders of Debtor (Nos. 1168, 1169, 1170); and

(b) by Harry R. Amott, et. al., Committtee of Debenture Holders of Debtor, and J. Donald Duncan, Trustee of Debtor (Nos. 1172, 1173, 1174).

As these cases, insofar as Adelaide H. Knight and William P. Doyle are concerned, arise from identical facts and

present the same question, respondents respectfully request permission to file this single answering brief.

Question Presented

Did the Circuit Court of Appeals err in ruling that stockholders of a solvent debtor have the right, before consummation of a plan of reorganization, to preserve their equity by paying creditors in full with interest?

The artificial subdivision of this sole issue by petitioners and their additions of extraneous matter is only confusing and accordingly ignored.

Statement of Facts

On May 13, 1946, the District Court confirmed the Trustee's Plan, although approval was secured from less than 20% of the stockholders (R. 246-247). On July 11, 1946, prior to the consummation of the Plan, the transfer of any of the debtor's assets or the issuance of any new securities, Knight and Doyle, stockholders, appeared before the District Court and petitioned for modification of the Plan so as to give the stockholders an opportunity to preserve their equity. The modification proposed by the stockholders, which was then underwritten by the City Investing Company, provided for payment in full, with interest, of the claims of the debenture holders in lieu of the proposed allocation to them of 92% of the assets of the debtor as provided in the Plan. The immediate opposition of the debenture holders to the modification was readily understandable since the then market price of the debentures was double the amount of their claims plus accrued interest (R. 28, 35). Instead of receiving a mere 100 cents on

the dollar, they naturally preferred to foreclose on the equity, leaving to the stockholders less than 9% thereof.

Without receiving any testimony and without considering the merits of the stockholders' proposal, the District Court denied their petitions. The Circuit Court of Appeals, having all the facts before it, reversed, holding in effect that the modification offered by the stockholders Knight and Doyle was fair, equitable and feasible and that the District Court abused its discretion in failing to approve the modification and submitting it to the stockholders for acceptance or rejection.

The debenture holders then made application to the Circuit Court of Appeals to modify its opinion by limiting the time of the stockholders to produce an underwriting to a maximum of thirty days after the issuance of the mandate. Obviously, no underwriter would come forward during such period while the possibility of appeal remained. Recognizing that the debenture holders' desire to so limit the time for submission of proposals was motivated not by a legitimate need to protect the payment of their claims but by the hope of working a forfeiture, the Circuit Court ruled that such underwriting could be produced at any time up to sixty days after no further possibility of appeal remained.

The debenture holders have now learned that the necessary underwriting is again available to the stockholders. It is their purpose in petitioning this Court for certiorari to so delay the reorganization proceedings that the current underwriting offer will be withdrawn and that they will then be able to accomplish the foreclosure for which they have so arduously pressed.

Reasons for Denying the Writs

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS OR ANY OTHER COURT OF RECORD.

There has never been a holding by any court that stockholders of a solvent debtor could not modify a plan of reorganization after confirmation, but before consummation, so as to preserve their equity by providing for payment to creditors in full.

(a) In view of the familiarity of the Court with its recent decision in *Insurance Group Committee* v. *Denver and Rio Grande Western R.R.* (No. 690—October Term, 1946), it is unnecessary to elaborate the point that there is no conflict between that decision and the ruling of the Circuit Court in this case. Mr. Justice Reed clearly distinguished the two situations, saying:

> "Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support. See *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482; *Group of Investors* v. *Milwaukee R. Co.,* 318 U. S. 523, 541."

Suffice it to say, payment in full with interest for the objecting creditors was not provided for in any of the railroad reorganizations and reconsideration, not modification, was involved in each.

(b) The debenture holders allege that the decision of the Circuit Court is in conflict with its previous holdings and with the views of other circuits. In the absence of more apposite cases, they support this argument by reference to *In re Diversey Bldg. Corp.* 141 F. (2d) 65 (C. C. A. 7th, 1944), and *Country Life Apts.* v. *Buckley,* 145 F. 2d 935 (C. C. A. 2nd, 1944), together with a few other cases even less in point. The language quoted from the *Diversey* case might make it appear that the Court had in mind a situation where, as here, a plan had been confirmed but not yet consummated. That this language was taken out of its context is shown by the following quotation from the opinion, the Court distinguishing a situation such as the present one:

> "Here the Plan as confirmed had been in operation for almost eight years. . . . In support of its contention, appellant relies on *In re H. W. Clark Co.,* 79 F. 2d 681, *Downtown Investment Association* v. *Boston Metropolitan Buildings,* 81 F. 2d 314 and *In re Celotex Co.,* 12 Fed. Supp. 1. These cases relate to amendments of the Plan of reorganization before its consummation and for that reason we think they are not in point." (pp. 68-69)

An examination of the record in the *Country Life* case discloses that the appellants did not rely on or even cite Section 222 which expressly authorizes modifications of a plan after confirmation. They called their proposals a new plan. The District Court had described this plan as a lot of claptrap, unfair, inequitable and not in good faith. The approved plan, like the proposed modification here, provided for the payment of creditors in cash. The "claptrap", resembling the instant Plan, called for delivery of new secu-

rities and control to the proponent who was castigated by the District Court as unjustifiably selfish. (A copy of this unreported opinion of the District Court is submitted with this brief.)

In any event, the *Country Life* case establishes that the debenture holders have no standing to object to the proposed modification. The Circuit Court held (p. 938):

> "Under Bankruptcy Act, § 179, no acceptance need be obtained from a class of creditors or stockholders 'for whom payment or protection has been provided' as prescribed in § 216 (7, S). See 3 *Gerdes on Corporate Reorganizations,* 1936, § 1113."

It is accordingly evident that petitioners cannot seriously challenge the power of the Court to approve the proposed modification. If there were ever any question about it, the matter was squarely decided adversely to petitioners' contention in *In re 1934 Realty Corp. (Hurd Committee* v. *Prudence)* 150 F. (2d) 477 (C. C. A. 2nd, 1945); cert. den. 326 U. S. 734 (1945). The argument that the Court lacked power to make "changes which do not aid in carrying out an approved Plan", (Amott Brief, p. 12) was also there urged in the petition for certiorari, surprisingly enough by the same counsel who now represents the Trustee in the instant matter. In his petition (p. 10), he contended that the Circuit Court of Appeals had erred

> *"in holding that after* adjudication of petitioner's status and the *confirmation* of a plan, where consummation required only the preparation, execution and delivery of formal documents specified in the plan, and neither the adjudication, nor the order of confirmation can be appealed from, *amendments may be approved which adversely affect petitioner's* status, over petitioner's objections."

This Court did not deem the argument of sufficient substance to warrant the granting of certiorari. The reasons are abundantly clear from the opinion of this Court in *Young* v. *Higbee,* 324 U. S. 204, 214 (1945).

II.

THE CIRCUIT COURT OF APPEALS WAS IN JUSTICE COMPELLED TO REVERSE THE DISTRICT COURT.

(a) It correctly ruled that a proposed modification which is fair and equitable and is opposed only by a class of creditors not materially and adversely affected must be approved.

The modification proposed by respondents is fair and equitable to all interested parties. The first mortgage would remain undisturbed. The holders of the second mortgage bonds would receive their interest as well as the full principal amount of their claims. The debenture holders would likewise receive payment in full with interest. The stockholders would receive that to which they are entitled, namely, the right to preserve their equity.

The proposed modification is opposed only by the debenture holders. It is supported by the S. E. C., the debtor, the stockholders and the holders of the second mortgage bonds (R. 166). The holder of the first mortgage, which would remain undisturbed, has taken the position that it is not materially and adversely affected and has indicated its acceptance (R. 164).

The debenture holders have no standing in a court of equity to attack a modification which provides for the payment of their claims in full with interest, since such debenture holders are not adversely affected by the proposal.

> "A class of creditors whose claims are to be paid in cash in full are obviously not adversely affected." 2 *Gerdes on Corporate Reorganizations*, 1683.

See also

> *Country Life Apartments* v. *Buckley, supra; National City Bank* v. *O'Connell, Trustee of U. S. Realty*, 155 F. (2d) 329 (C. C. A. 2d, 1946).

It should be noted that petitioners' complaint "that the effect of the decision is to leave no field for the exercise of discretion by the District Court" (Amott Brief, p. 25) is unfounded. The Circuit Court of Appeals, having all the facts before it, in no way denied the existence of discretion in the District Court. It affirmed that discretion, holding, however, that the failure of the District Court to approve the stockholders' petition in this case was an abuse of discretion, requiring reversal. Thus, what the Circuit Court did in reversing the District Court was to rule that the modification proposed by the stockholders was fair, equitable and feasible, and that therefore the District Court should have approved it. Certainly, the determination by the Circuit Court that the stockholders' modification should have been approved by the District Court is an entirely different matter from taking away this prerogative of the District Court and vesting it in the stockholders. From the schedule presented at page 162 of the record on appeal, the Circuit Court could readily determine that the reorganized company could fulfill its obligations after consummation of the Plan as modified by the stockholders. The Trustee's last monthly report discloses the reliability of this estimate, since it shows that the debtor had in cash at the close of business on March 31, 1947, the sum of $2,720,941.46.

(b) After the decision by the Circuit Court of Appeals, the petitioners informally advised all parties in interest that they did not intend to seek review of the decision of the Circuit Court. They then made application to that Court to modify its decision so as to limit the time of the stockholders for obtaining a suitable underwriting to a mere thirty days. The debenture holders knew that no underwriter would come forward while the possibility of appeal remained. The Circuit Court appreciated what was behind this maneuver by the debenture holders, for in its modifying opinion the stockholders were given sixty days to come forth with the requisite underwriting after no further possibility of appeal remained. The present contention that the Circuit Court should have dismissed respondents' appeals upon the ground of mootness is obviously made with tongue in cheek, since it is only because of their knowledge that the stockholders have made new arrangements with an underwriter that they have now petitioned for certiorari. If the matter were really moot, the debenture holders would merely have waited for the time of the stockholders to expire on May 31, 1947, and they then would have proceeded with their original plan. Their failure to wait until that date without applying for writs of certiorari, can be taken by this Court as conclusive evidence that the debenture holders themselves do not rely upon their contention of mootness.

(c) The Circuit Court of Appeals deemed unworthy of notice the contention of the petitioners that the application of the stockholders was in effect a motion for a rehearing. Mr. Justice Reed of this Court also advised the present petitioners upon the oral argument of the previous appeal that he saw no merit in this contention and he likewise refused

to give consideration to it in his opinion. In view of this, respondents see no need to further discuss the point other than again to state, on the authority of *In re 1934 Realty Corp. (Hurd Committee* v. *Prudence), supra,* that the denial of an application for modification of an order of confirmation is unquestionably appealable. This is conceded by petitioners (Amott Brief p. 26) despite their formal argument to the contrary (Amott Brief p. 32).

III.

NO QUESTION HAS BEEN PRESENTED WHICH NECESSITATES CONSIDERATION BY THIS COURT.

As has been previously pointed out, there is no conflict among the decisions of the Circuit Courts. The determination of the single question presented is so elementary as to not warrant reconsideration by this Court. Petitioners have tried to give the misleading impression that the prior opinion of Mr. Justice Reed in this case left certain questions open for special determination by this Court. (Amott Brief, p. 21). On the contrary, Mr. Justice Reed has stated that these issues are regarded as matters for determination by the Circuit Court:

> "This determination can only be obtained after decisions by the Circuit Court of Appeals." (R. 368)

Therefore, unless the Circuit Court of Appeals erred in ruling that stockholders of a solvent debtor, before consummation, could preserve their equity by paying creditors in full with interest, further review is unnecessary and could cause the stockholders to forfeit their equity through the loss of the underwriting.

Respondents therefore pray that the several petitions for certiorari be denied.

Respectfully submitted,

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April 17, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM—1946

Nos. 1169, 1170.

HUDSON McGUIRE, *et al.*, *Petitioners,*

v.

EQUITABLE OFFICE BUILDING CORPORATION (name changed to "Equitable Office Building 1913 Co. Inc."), Debtor, and CHARLES A. DANA, *et al.*, Committee of Common Stockholders of Debtor, *Respondents.*

Nos. 1173, 1174.

HARRY R. AMOTT, *et al.*, Debenture Holders' Protective Committee, and J. DONALD DUNCAN, Trustee, *Petitioners,*

v.

CHARLES A. DANA, *et al.*, Common Stockholders Committee, and EQUITABLE OFFICE BUILDING CORPORATION (name changed to "Equitable Office Building 1913 Co. Inc."), Debtor, *Respondents.*

JOINT BRIEF OF DEBTOR AND COMMON STOCKHOLDERS COMMITTEE IN OPPOSITION TO PETITIONS FOR CERTIORARI

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JOINT BRIEF OF DEBTOR AND COMMON STOCKHOLDERS COMMITTEE IN OPPOSITION TO PETITIONS FOR CERTIORARI

This brief is in opposition to the petitions for certiorari by Harry R. Amott, et al., constituting a committee of debenture holders and by J. Donald Duncan, Trustee of Debtor; and to the separate petition for certiorari of Hudson McGuire, et al.

Opinions Below

The District Judge filed a memorandum opinion (R. 99) in denial of the petition of stockholders, Knight and Doyle. He denied the petitions of the Stockholders Committee and of the Debtor without opinion (R. 101, 142). Mr. Justice Reed filed an opinion in granting to the stockholders and the Debtor a stay (R. 362) and the Circuit Court of Appeals filed an opinion of reversal of the District Court on the appeal of Knight and Doyle (R. 427, 158 F. (2) 838), and a per curiam opinion on the appeals of the Debtor and the Stockholders Committee (R. 437, 158 F. (2) 982).

Jurisdiction

The petitioners invoke jurisdiction under § 24(c) of the Bankruptcy Act (11 U. S. C. A. § 47(c)) and under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., § 347(a)).

Statutes

Pertinent provisions of the statutes will be found in the Appendix.

Facts

On April 10, 1941 the Debtor, owner and operator of Equitable Office Building at 120 Broadway, New York, being unable to pay its debts as they matured, although not insolvent, filed a voluntary petition for reorganization under Chapter X of the Bankruptcy Act, which was immediately approved (R. 1).

The Debtor's funded debt and capital stock at the close of its fiscal year, April 30, 1946, were as follows (R. 327, 328, 330):

First Mortgage		$15,880,543.35
Second Mortgage Bonds	$3,000.00	
Accrued interest	990.00	3,990.00
5% Debentures	4,754,000.00	
Accrued interest	1,069,650.00	5,823,650.00
		$21,708,183.35*
Common Stock without par		862,098 shs.

On December 4, 1945, a Plan of reorganization, submitted by the Trustee on May 11, 1945, was approved by the District Judge (R. 175) and on May 13, 1946, as amended, it was confirmed by him (R. 261). There was no appeal and on July 8, 1946 an order in aid of consummation followed, prescribing the details (R. 273), but the Plan has not been consummated by any transfer of assets or delivery of the required securities.

The Plan (R. 181) was predicated upon a finding by the District Judge that as at December 4, 1945 the land and building had a value of $21,375,000 and the Debtor's other assets a value of $1,205,761.17, making a total of $22,580,761.17 (R. 177, fol. 531).

The Plan provides that (R. 181): (1) the first mortgage be left undisturbed; (2) the second mortgage bonds be paid in cash without interest; (3) the holders of the $4,754,000 of Debentures receive: (a) $2,852,400 ($600 bond for each $1000 debenture) in new second mortgage 5% income bonds convertible within a period of two years into 456,384 shares of common stock or within three years thereafter into

* As of May 1, 1947 the First Mortgage will have been reduced to $15,583,865.06 while accrued interest on the Second Mortgage Bonds and Debentures will have increased to $1,170 and $1,307,350, respectively, so that the total debt will be $21,649,385.06.

285,240 shares (the conversion price amounting to about $6.25 per share for the first period and $10 for the later period); and (b) 475,400 shares of common stock, (100 shares for each $1000 debenture); and (4) the holders of common stock receive one share of new common for each ten shares of old, or a total of 86,210 shares.

It will be observed that the debenture holders by availing of their conversion rights within two years would receive 931,704 shares* out of the total of 1,017,994 shares, or 91.6% of the equity as compared with 8.4% which would be retained by the present stockholders.

The Plan offered little to the stockholders, as a result of which only a small percentage of them qualified for voting by filing proofs of claim (R. 239). Of the 862,098 outstanding shares 163,568 qualified and voted approval, 27,927 shares voting against it (R. 128, fol. 383; R. 246-47, fols. 738-39).

On July 11, 1946, stockholders Knight and Doyle presented their petition to the District Judge proposing a modification of the Plan based upon an underwriting offer hereinafter described (R. 4). This petition was amended on the same day so as to increase the underwriting offer from $4.50 per share to $5.50 per share (R. 38). On July 16, 1946, the Stockholders Committee presented their petition to the District Judge seeking dismissal of the proceeding upon full payment of the claims against the Debtor, this proposal being based upon a substantially identical underwriting offer which by then had been increased to $6 per share (R. 102). The same day the District Judge denied the Knight and Doyle amended petition with a short memorandum opinion (R. 99) and denied the petition of the Stockholders Committee without opinion (R. 101). On July 22, 1946, the Debtor filed its petition (R. 127) similar in form to the

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* Valuing the debentures at principal and accrued interest ($5,823,650) their exchange for 931,704 new shares immediately upon consummation of the plan would be at the rate of $6.26 per share.

petition of the Stockholders Committee and on the same day the stockholders Knight and Doyle filed an amended petition (R. 147) based upon the increase in the underwriting offer to $6 per share, both of which were denied by the District Judge on July 31, 1946 without opinion (R. 142, 146).

The theory of the petitions by the Stockholders Committee and by the Debtor differed from the petition of stockholders Knight and Doyle (which prayed for an amendment of the Trustee's Plan) in that they were based upon the equitable right of a debtor to pay its debts and redeem its equity at any time before transfer of its property, and they asked for a dismissal of the proceedings upon acceptance and performance of the underwriting offer.

Despite such differences, all of the petitions were similar in objective and were based upon underwriting offers by City Investing Company (an outstanding realty corporation whose ability to perform has not been questioned) which proposed a reduction of the present shares, one new for ten old (R. 134), as in the confirmed Plan, and the underwriting of an offer *pro rata* to the stockholders of 862,098 new shares at $6 per share, amounting to $5,172,588 which, with the addition of less than $1,000,000 from the funds held by the Trustee, would be sufficient to pay in full with interest the claims of the debenture holders and of the holders of the Second Mortgage Bonds.

To enable immediate payment of the debentures pending completion of the new stock issue, City Investing Company offered to purchase for cash $5,200,000 short term Trustee's certificates (R. 136). The underwriter asked 69,686 shares for its underwriting fee (R. 135) which would have resulted in a total issue of 1,017,794 shares as in the Trustee's Plan. The underwriting offer was accompanied by the certified check of City Investing Company for $517,258.80, or 10% of its proposed commitment (R. 137).

There was attached as an exhibit to Knight and Doyle's last petition an estimated projection by Glen W. Thomas, Comptroller of City Investing Company, of cash balances of the Debtor for the period July 1, 1946 to October 31, 1947,

if the underwriting offer be accepted. This shows that after paying the Debentures with interest in September, 194€ from the proceeds of the underwriting and cash on hand and giving effect to estimated monthly receipts of $315,000 and operating disbursements of $104,000 plus real estate taxes and interest and amortization on the First Mortgage, Debtor would have reduced the Mortgage by November 1, 1947 to $15,430,600 and have left a cash balance of $1,524,400 "more than enough funds with which to operate successfully" (R. 160-162).

Immediately upon denial by the District Judge of the relief requested each of the three petitioners filed notice of appeal to the Circuit Court of Appeals (R. 169-174) and applied to that Court for a stay, each application being denied without opinion (R. 382, 392, 393, 411, 423, 424).

Thereupon the three petitioners obtained a stay from Mr. Justice Reed under § 240(a) of the Judicial Code (R. 360, 361). The Debtor and the Stockholders Committee filed petitions to this Court for certiorari to review the action of the District Court and the denials of stay by the Circuit Court. Stockholders Knight and Doyle filed petitions for certiorari to review only the denial of stay by the Circuit Court. On November 25, 1946, this court entered an order (Nos. 609, 610, Oct. Term, 1946) as follows (67 S. Ct. 297):

> "So much of the respective petitions for certiorari in these cases as asks for a writ to review the order of the United States District Court for the Southern District of New York is denied."

The Circuit Court of Appeals then heard the appeals of Knight and Doyle, of the Stockholders Committee and of the Debtor, reversed the District Judge's orders (R. 427-439), and fixed the time within which a new underwriting offer might be submitted (R. 438).

The Circuit Court in its decision held: (1) although the underwriting offer of City Investing Company had expired in terms, the appeal had not become moot since a new offer might be made of enough cash to pay off the debentures;

(2) the District Judge had the power to submit the underwriting offer to the stockholders but, in the exercise of his discretion, had erred in refusing to do so, because (a) the rights of the debenture holders to the new securities provided for in the Plan had not vested; (b) although a long delay had occurred in arriving at a confirmed plan, such delay was not a good reason to deny the stockholders any reasonable chance to protect their own interests since the interests of the debenture holders are fully preserved; and (c) any doubts as to whether the new company would be too much stripped of liquid assets should properly be left to the stockholders for decision.

Question Presented

In proceedings under Chapter X of the Bankruptcy Act may a debtor, after confirmation of a plan of reorganization, but before its consummation by transfers of property and delivery of the required securities, avail of an improved value of its equity to pay off its creditors, principal and interest, in cash, and resume control of its property?

Summary

1. The Circuit Court was correct in holding that prior to consummation of a plan of reorganization the stockholders have the right to save their equity by paying off the debenture holders in full with interest in cash. The debenture holders resist payment because the value of the securities allotted to them under the Plan exceeds the amount of their claims. The right of redemption is an underlying equitable doctrine with which the purposes of Chapter X of the Bankruptcy Act are in harmony. The bankruptcy courts exercise all equitable powers not prohibited by the act.

2. The decision of the Circuit Court in this case is in accord with the decisions of this Court in analogous cases.

In view of the unique facts of the present case, namely, the proposal to pay in full the claims of the debenture holders, there is no conflict between this decision and decisions in other circuits.

3. § 222 permits, with approval of the Judge, alteration or modification of a confirmed plan though it materially and adversely affects the interests of creditors and stockholders. This proposal to pay creditors in full did not affect them adversely. The District Judge was not justified in withholding approval.

4. The question is not moot.

5. The decision of the Circuit Court does not deprive the District Judge of discretion in considering upon remand such new proposals as may be submitted by the Debtor and the stockholders, when the language of the decision is viewed in the light of all the facts of the case.

I.

A debtor in reorganization may, before a confirmed plan has been consummated by delivery of the required securities and transfers of property, pay off its creditors and resume control of its own property.

A. The Decision of The Circuit Court To This Effect Is In Accord With A Doctrine Long Recognized By This Court.

The right of a debtor to pay off its creditors and resume control of its property springs from an underlying equitable doctrine.

In *Railroad Company* v. *Soutter*, 69 U. S. 510 (1864), after the contested amount of the debt had been determined, the Railroad Company offered to pay in full on condition that a receiver be discharged. The court below rejected that proposal. This Court said (p. 522) that the right of the defendant to pay its indebtedness and to have a restoration

of its property by discharge of the receiver was clear and did not depend on this discretion of the Circuit Court.

> "* * * It is a right which the party can claim; and if he shows himself entitled to it on the facts in the record there is no discretion in the court to withhold it. But refusal is error—judicial error—which this court is bound to correct when the matter, as in this instance, is fairly before it. * * *"

Bankruptcy courts exercise all equitable powers not prohibited by the Act (*Young* v. *Higbee Co.*, 324 U. S. 204, 214 (1945); *Pfister* v. *Finance Corp.*, 317 U. S. 144, 152 (1942); *Securities Comm'n* v. *U. S. Realty Co.*, 310 U. S. 434, 455 (1940); *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 136, 137 (1937)).

The remedial purposes of Chapter X should be observed. If a debtor, in the course of the proceeding, has become favored by economic changes which have improved its asset values, or their liquidity, enabling it to pay its matured debts, an offer to pay its debts in full should be entertained at any time before vesting of opposing rights.

The petitions of the Debtor and Stockholders Committee to the District Court and their subsequent petitions to this Court for writs of certiorari (Nos. 609, 610, October Term, 1946), based their contentions upon this equitable doctrine and asked for a dismissal of the proceeding upon an acceptance and performance of the offer of City Investing Company. The Circuit Court, in reversing the District Court, granted the relief prayed for by Debtor and the Stockholders Committee by way of amendment to the Trustee's Plan under § 222, as prayed for in the Knight-Doyle petition, instead of by dismissal of the proceeding. The result to the Debtor and the Stockholders Committee is the same.

There is no conflict between the decision of the Circuit Court and the recent decision of this Court in *Insurance Group Committee* v. *Denver & Rio Grande Western R. R. Co.*, No. 690—October Term 1946, 91 L. Ed. 436. This Court

held in that case that a reexamination of a plan for the reorganization of a railroad company could not be directed without a showing of unconsidered changes in economic circumstances or unless it could be reasonably contended that the senior creditors had received more in value than the face of their claims. In the instant case the change in circumstances reflected by the offer of new cash financing occurred after the hearings upon and the confirmation of the Plan (R. 127, 129).

The resistance of the debenture holders to payment of their full claims in cash instead of in the stock, and bonds convertible into stock, allowed them under the Plan sufficiently establishes the improved value of the property. It is commonly known that since the war there has been a general upsurge in the value of real estate.

The principal and interest of the debentures as at April 30, 1946 amounted to $1,225 per debenture, or as quotations are generally made in the market, $122.50 per $100 face amount of debenture. Petitioners, McGuire, *et al.*, paid in the market an average of $235 per $100 for each debenture (R. 76, fol. 226). Another debenture purchaser, Lesch, paid at the rate of $225 per $100 (R. 97, fol. 289). Those prices reflected the stock and conversion rights and the improved equity values.

Moreover, the fact that a company experienced in New York real estate as City Investing Company offered more than $5,000,000 in cash upon a stock underwriting not previously obtainable indicates an increase in equity value.

Furthermore, under the Plan, the debenture holders are allotted stock and conversion rights of a value greater than the face of their claims.

One month after the confirmation of the Plan, the selling price of a debenture had risen to $2,300 (R. 379) almost double the face of the claim represented thereby of $1,225 in principal and accrued interest. The holder of a debenture would, under the Plan, receive 100 shares of new common stock and a new $600 bond convertible at once into 96 shares of new stock, so that he could hold, if he wished, 196 shares

of stock. After confirmation the new stock sold for as much as $13 per share on a "when issued" basis (R. 55) so that the 196 shares of stock had an indicated market value of approximately $2,550, or more than double a debenture claim for $1,225.

There is a further and basic difference between the present case and the railroad reorganization cases. Here the stockholders proposal will pay off in full, with interest, in cash, all matured claims against the debtor. This factor was not present in the railroad reorganization cases. There the debtor or its stockholders merely sought to have the plan reexamined in order to see whether a new plan more favorable to them could not be devised.

B. The decision of the Circuit Court is not in conflict with the decisions of any Circuit.

In the petition and brief of the Stockholders Committee to this Court for certiorari in Case No. 609 October Term 1946, which petition was denied in part on November 25, 1946 (*Dana, et al.* v. *Duncan*, 67 S. Ct. 297), reference was made to the seemingly inconsistent decisions of the Circuit Court of Appeals for the Second Circuit in *Country Life Apartments* v. *Buckley*, 145 F. (2d) 935 (1944), and *In re 1934 Realty Corporation*, 150 F. (2d) 477 (1945), cert. den. 326 U. S. 734 (1945). The decision of the Circuit Court in this case is in accord with its decision in the *1934 Realty Corporation* case and properly distinguished the *Country Life Apartments* case on its facts (R. 431, 432).

The petitioners have cited cases decided by other Circuit Courts which are claimed to be in conflict with the decision of the Circuit Court in this case. An examination of the facts of those cases show radical differences between them and the present case. The petitioners rely most strongly on *Diversey Building Corp.* v. *Metropolitan Trust Co.*, 141 F. (2d) 65 (C. C. A. 7, 1944). There the two most important factors were that (1) the amendments were proposed some eight years after the plan of reorganization had been consummated and new securities issued; and (2) the proposals

provided for payment of claims of creditors partly in cash and partly in stock, thereby radically changing the plan of reorganization. The Circuit Court in this case properly distinguished the *Diversey Building Corp.* case (R. 432). The other cases cited by the petitioners differ so greatly in their facts from the present case that there is no need to discuss them here.

II.

The Circuit Court correctly held that confirmation of the Plan did not vest rights in creditors.

Since § 222 of the Bankruptcy Act expressly permits modifications of a plan after confirmation, even if "they materially and adversely affect the interests of creditors", it cannot be said that confirmation finally vests interests in creditors. § 226, which provides that upon *consummation* the property shall be "free and clear of all claims and interests of the Debtor, creditors, and stockholders", as well as § 236, which expressly authorizes dismissal of proceedings *after confirmation,* further emphasizes that confirmation does not vest rights.

"Confirmation of a plan of reorganization is but a step in the administration of the debtor's estate * * *" and an order of confirmation is not the equivalent of a final discharge *Meyer* v. *Kenmore Hotel Co.,* 297 U. S. 160 (1936).

As this Court said in *Pfister* v. *Finance Corp.,* 317 U. S. 144, 152 (1942):

> "The entire process of rehabilitation, reorganization or liquidation is open to re-examination out of time by the District Court, in its discretion and subject to intervening rights."

Petitioners, McGuire, et al., claim that the confirmation of the Plan entitled them to trade in the market upon the anticipated security values in reliance upon an allegedly vested right to receive securities allocated to debenture holders under the Plan (McGuire brief, pages 8 and 9).

But they are assumed to have known that an order confirming the Plan was subject to the express qualifications and possibilities of modification under § 222. Quite obviously the District Judge may not permit daily market speculation to control his approval or disapproval of a proposed modification of a plan.

III.

The question is not moot.

The offer of City Investing Company to Knight and Doyle dated July 19, 1946 ran to October 15, 1946 "or such later date as the undersigned may agree to" (R. 156, fol. 468). The similar offer to the Common Stockholders Committee dated July 16, 1946 ran for 90 days (R. 107, fol. 321). The offer to the Debtor ran until October 15, 1946 "unless sooner rejected by you or extended by us" (R. 134, fol. 402).

The City Investing Company could not reasonably have been expected to stand still upon a commitment of $5,172,588 to await the end of litigation of the question whether its offer could be considered. The deposit of a check for $517,258 (R. 137) showed good faith. The offer to purchase at par up to $5,200,000 of Trustee's certificates to provide immediate funds (R. 136, fol. 408) was equivalent to an offer to lay the money on the table. Except for the opposition of debenture holders they would have been paid in full and the Debtor would now be upon its way.

Since there is nothing in the record to show that the value of the Debtor's property has declined since the making of the underwriting offer, the Circuit Court properly directed that the door be kept open a reasonable time within which the Debtor or the stockholders might produce the same or an equally responsible underwriting sufficient to pay off the debentures, principal and interest.

IV.

The decision of the Circuit Court does not deprive the District Court of discretion in considering, upon remand, the same or similar proposals by respondents.

The petitioners contend that the Circuit Court, in directing the District Court to approve a new proposal, thereby deprived the District Court of jurisdiction to determine the questions of fairness, equitableness and feasibility of the proposals in alleged violation of § 221 of the Bankruptcy Act. In so contending they have failed to read this portion of the Circuit Court's decision in the light of the entire posture of the case. The District Court had approved a plan as fair, equitable and feasible. Since the proposals of the respondents afforded all stockholders of the Debtor an equal opportunity to retain their proportionate share of the equity in the Debtor's assets, except as to the stock to be awarded as an underwriting commission, there could be no question but that the proposals were fair and equitable to those affected thereby—namely, the stockholders. The Debenture holders would not be affected since they would be paid off in cash.

Furthermore, the Circuit Court directed that the new underwriting offer must be "reliable and practical", thus disposing of all arguments with respect to "feasibility".

The petitioners in Nos. 1172, 1173 and 1174 express anxiety over the possibility of foreclosure of the First Mortgage as a result of the absence of a Reserve Fund therefor and of a lack of adequate working capital. It is a sufficient answer to this that a company of the experience of City Investing Company had no fear of foreclosure and was willing to back its judgment with an underwriting offer of over $5,000,000 in cash. In addition it is pertinent to recall that the Circuit Court was considering a modification of a Plan which would permit the stockholders to retain their equity in the Debtor's assets and to pay off the debenture holders in cash, rather than turn over 91% of

such equity to the debenture holders. Therefore, any questions as to the feasibility of the modification, or as to its fairness as among the stockholders, is no concern of the debenture holders.

Conclusion

It is respectfully submitted that the applications for writs of certiorari should be denied.

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April 18, 1947.

APPENDIX

SECTIONS OF THE BANKRUPTCY ACT

Section 24c (11 U. S. C., § 47c) The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Court of Appeals of the United States and the United States Circuit Court of Appeals of the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

Section 121 (11 U. S. C., § 521) Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding.

Section 130(1) (11 U. S. C., § 530) Contents—Every petition shall state—

(1) that the corporation is insolvent or unable to pay its debts as they mature;

* * * * * *

Section 216(1) (11 U. S. C., § 616) Provisions of plan—A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

* * * * * *

Section 221(1)(2) (11 U. S. C., § 621) Confirmation by court—The judge shall confirm a plan if satisfied that—

(1) the provisions of Article VII, section 199, and Article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

* * * * * *

Section 222 (11 U. S. C., § 622) Alteration or modification of plan—A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in Article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

Section 224 (11 U. S. C., § 624) Effect of confirmation—Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commisison having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the

moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

Section 226 (11 U. S. C., § 626) The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

Section 228 (11 U. S. C., § 628) Final decree on consummation of plan—Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

Section 236 (11 U. S. C., § 636) If no plan is proposed within the time fixed or extended by the judge, or if no plan

proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

* * * * * *

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

Section 240a of the Judicial Code

Sec. 240a of the Judicial Code: (28 U. S. C. A., § 347a) *Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.* (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.